VOLUME I

TRANSCRIPT OF RECORD

REME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 75

EDERAL TRADE COMMISSION, PETITIONER

vs.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

RIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 20, 1952
CERTIORARI GRANTED OCTOBER 13, 1952

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 75

FEDERAL TRADE COMMISSION, PETITIONER

VS.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

229355—52——1

In United States Court of Appeals for the Fifth Circuit

No. 13493

TION PICTURE ADVERTISING SERVICE COMPANY, INC., A CORPORATION, PETITIONER

VERSUS

FEDERAL TRADE COMMISSION, RESPONDENT

Petitioner's designation as to printing record

Filed June 27, 1951

Motion Picture Advertising Service Company, Inc., petitioner appellant in the above entitled action, designates the following portions of the record to be contained in the transcript on appeal in the above entitled action:

Petition to review and set aside order of Federal Trade Commission filed December 27, 1950.

Complaint filed May 26, 1947.

Answer of respondent filed June 16, 1947.

Order denying plea of res judicata filed February 20, 1948.

5. Opinion of Federal Trade Commission on plea of res judicata filed February 20, 1948.

Proposed findings and conclusions of respondent filed March 14, 1949.

Suggested findings and conclusion of counsel supporting the complaint filed March 15, 1949.

Order closing proceedings filed April 26, 1949.

Trial Examiner's recommended decision filed May 31, 1949.

Stipulation filed June 15, 1949.

Findings as to facts and conclusion filed October 17, 1950.

Order to cease and desist filed October 17, 1950.

Opinion of the Commission filed October 17, 1950.

Dissenting opinion of Commission Lowell B. Mason.

Motion to modify cease and desist order filed December 29,

Answer to motion to modify order to cease and desist filed January 15, 1951.

17. Order denying respondent's motion to modify order to cease and desist filed March 6, 1951.

18. This stipulation.

(S) ROSEN, KAMMER, WOLFF,
HOPKINS & BURKE,
LOUIS L. ROSEN,
Attorneys for Motion Picture Advertising Service Company, Inc., Petitioner and Appellant.
1801 HIBERNIA BANK BUILDING, NEW ORLEANS, LOUISIANA.

STIPULATION

I have examined the copy of the designation of petitioner and agree that the items therein listed contain all the portions of the record necessary to be included in the transcript on appeal.

(S) Jno. W. Carter, Jr.,
(JNO. W. CARTER, JR.),
Acting Assistant General Counsel in Charge of Appeals.

JUNE 22, 1951.

In United States Court of Appeals

Petition to review and set aside order of Federal Trade Commission

Filed December 27, 1950

[Title omitted.]

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Your petitioner, Motion Picture Advertising Service Company, Inc., respectfully shows:

I.

That your petitioner is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Louisiana, having its office and principal place of business in the City of New Orleans, State of Louisiana, and carrying on business of motion picture advertising within the jurisdiction of this Court, to wit: within the State of Louisiana, and elsewhere within the United States.

II

That on May 26, 1947, the Federal Trade Commission, in a proceeding entitled; "In the matter of Motion Picture Advertising Service Company, Inc., a Corporation," Docket

498, issued its complaint against your petitioner in which s alleged, among other things, that in the course and con- of its business petitioner enters into long-term agreements motion picture exhibitors for the exclusive display of peti- 's advertising films on the screens of said exhibitors, and said exclusive screening agreements constitute an unfair od of competition in commerce, which result in an unlawful it of trade, or which tend to monopolize the industry in ion of the provisions of Section 5 of the Act of Congress ved September 26, 1914, 38 Stat. 717 (U. S. C., Title 15, Sec- 41), as amended March 21, 1938, 52 Stat. 111, commonly n as the "Federal Trade Commission Act."

III

at thereafter your petitioner filed its answer to the said com- issued against it under which petitioner denied that the ce complained of constituted an unreasonable restraint of or tended to monopolize the industry, or was an unfair od of competition in violation of the provisions of Section aid "Federal Trade Commission Act," and petitioner denied material allegations in said complaint contained.

IV

at thereafter the Federal Trade Commission held hearings e a Trial Examiner appointed by the Federal Trade Com- mission, and received testimony and other evidence in support of said complaint and in opposition thereto, which said testimony so taken was reduced to writing and filed office of the Federal Trade Commission.

V

at thereafter on May 31, 1949, the said Trial Examiner of ederal Trade Commission made and filed his "Trial Exam- Recommended Decision" in said proceeding, copy of said report was served upon your petitioner.

VI

at thereafter on October 17, 1950, the Federal Trade Com- on issued in said proceedings its "Findings As To The Facts Conclusion," together with "Order To Cease and Desist"; aid order directed against your petitioner is in the words gures following, to wit:

"It Is Ordered that the respondent, Motion Picture Advertising Service Company, Inc., a corporation, and its officers, representatives, agents and employees directly or through any corporate or other device, in connection with the sale, leasing or distribution of commercial or advertising films in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

"Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theatres owned, controlled or operated by such exhibitors when
7 the term of such contracts extends for a period in excess of one year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

"It Is Further Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order."

VII

That said "Order To Cease And Desist" was served upon your petitioner by registered mail on November 2, 1950.

VIII

That the said "Findings As To The Facts And Conclusion" of said Federal Trade Commission are in material respects contrary to the law and the evidence; that the "Order to Cease and Desist" issued by the Commission against your petitioner is not supported by the facts in the record, or by the law, and, therefore, should be set aside and annulled.

IX

That petitioner makes the following assignment of errors upon which it intends to rely:

(1) That the Federal Trade Commission erred in failing
8 to hold that it does not have jurisdiction of the proceedings because the interest of the public is not involved within the meaning and intent of Section 5 of the "Federal Trade Commission Act."

(2) That the Federal Trade Commission erred in failing to hold that it does not have jurisdiction of the proceedings because of the Commission's prior adjudication in Docket No. 4736 of the sole issue involved in this proceeding and, therefore, petitioner's

plea of "res judicata" should have been sustained by the Commission.

(3) That the Federal Trade Commission erred in refusing to hold that the evidence in the record is insufficient to sustain the allegations of the complaint.

(4) That the Federal Trade Commission erred in refusing to hold that petitioner's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not constitute an unfair method of competition in commerce, and the interest of the public is not involved, within the meaning and intent of Section 5 of the "Federal Trade Commission Act."

(5) That the Federal Trade Commission erred in failing to hold that petitioner's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not unduly restrain, lessen, suppress, or injure competition in the interstate sale, lease, rental, or distribution of advertising films, and do not unduly hinder or prevent competing producers, sellers and distributors of advertising films from selling, leasing, renting, or distributing such films, and do not monopolize in
9 said petitioner the sale, lease, rental, or distribution of advertising films in commerce.

(6) That the Federal Trade Commission erred in failing to hold that petitioner's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not have a tendency to hinder or prevent, and have not actually hindered or prevented, competition in the sale, lease, rental, or distribution of advertising films in commerce within the meaning and intent of the "Federal Trade Commission Act"; and have not unreasonably restrained such commerce in advertising films, and do not have a tendency to create in petitioner a monopoly in the sale, lease, rental, or distribution of such films, and do not constitute unfair methods of competition in commerce within the meaning and intent of Section 5 of the "Federal Trade Commission Act."

(7) That the Federal Trade Commission erred in refusing to dismis the complaint against your petitioner which was not supported by the facts in the record or by the law.

(8) That the Federal Trade Commission erred in issuing the "Cease And Desist Order" which prohibits petitioner from "continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order, since the issuance of any retroactive order by the Federal Trade Commission was not raised in the
10 pleadings, or made an issue in the proceedings, and no evidence of the effect of such an order of petitioner is contained in the record.

Wherefore, petitioner prays that a certified copy of this petition be forthwith served by the Clerk of this Court upon the Federal Trade Commission to the end that said Commission may be required, in conformity with the statute, to certify and file in this Court a transcript of the entire record in the proceedings aforesaid, wherein said "Cease And Desist Order" was entered, including all of the testimony taken, the recommended findings as to the facts, conclusion, decision, and "Cease And Desist Order" made by the Trial Examiner in said proceedings, and the report and order of said Commission, and that upon a review of said Order, in and by this Honorable Court the "Cease and Desist Order" of the Federal Trade Commission aforesaid be set aside or, in the alternative, that said "Cease and Desist Order" be modified by deleting therefrom the following words, to wit:

"* * * or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order."

ROSEN, KAMMER, WOLFF,
HOPKINS & BURKE,
LOUIS L. ROSEN,
Attorneys for Motion Picture Advertising Service Co., Inc., a Corporation, Petitioner.

11 [*Duly sworn to by Louis L. Rosen; jurat omitted in printing.*]

In United States Court of Appeals

Order to file petition

Filed December 27, 1950

[Title omitted.]

A petition to review the Order of the Federal Trade
12 Commission, entered October 17, 1950, "In the Matter of Motion Picture Advertising Service Company, Inc., a Corporation" Docket No. 5498, having been presented to this Court;

It Is Ordered that said petition be filed and that a copy of this order and said petition be forthwith served upon the Federal Trade Commission, and that said Federal Trade Commission, upon service of such copies, forthwith certify and file in this Court, a transcript of the entire record in said cause.

(Signed) WAYNE G. BORAH,
United States Circuit Judge.

NEW ORLEANS, LOUISIANA, *December 27, 1950.*

Before Federal Trade Commission

Docket No. 5498

IN THE MATTER OF MOTION PICTURE ADVERTISING SERVICE COMPANY, INC., A CORPORATION

Complaint

May 26, 1947

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Motion Picture Advertising Service Company, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One. Respondent is a corporation organized under the laws of the State of Louisiana with its office and principal place of business located at 1032 Carondelet Street, New Orleans, Louisiana.

Paragraph Two. Said respondent for more than ten years last past has been, and is now, engaged in the business of producing, selling, leasing, renting, and distributing commercial or advertising films to or for advertisers of various commodities and to other distributors of such films. Said respondent furnished display services to advertisers through the exhibiting of such films upon the screens of motion picture theaters throughout the United States, with whom respondent has screening agreements.

Said respondent is one of the largest producers and distributors of commercial or advertising films in the United States and causes said films when produced, sold, leased, or rented to be transported from its place of business to motion picture theaters located throughout the several States of the United States and in the District of Columbia, where said films are displayed on the screens of such theaters for a specified period of time, usually one week. Upon the conclusion of the display period such films are returned by the theater or exhibitor to said respondent.

There has been, and now is, a constant recurring course and flow of said films in interstate commerce throughout the several States of the United States and in the District of Columbia.

Paragraph Three. Said respondent has been from time to time, and is now, in active and substantial competition with other distributors of commercial or advertising films in the sale, rental, and distribution thereof in said commerce.

Paragraph Four. In or about the year 1937, and from time to time thereafter, said respondent has entered into long term screening agreements with various motion-picture exhibitors for the exclusive privilege of exhibiting commercial or advertising
15 films, produced or distributed by it, on the screens of the theater or theaters owned or controlled by said exhibitors, whereby said respondent pays the exhibitor at a stipulated rate for the privilege of displaying its advertising films. Such agreements are known and designated as "Theatre Screening Agreements" and provide, in part, that said respondent is granted the exclusive privilege of exhibiting commercial or advertising film or slide advertising on the screen of the exhibitor and that the said exhibitor will not display commercial or advertising films, other than that furnished by said respondent, except announcements of exhibitor's coming attractions and charitable, civic, and governmental announcements, for which no compensation is to be received by the exhibitor. The foregoing provision has been enforced by said respondent and adhered to by a substantial number of exhibitors located in various States of the United States and in the District of Columbia.

Paragraph Five. The capacity, tendency and effect of the aforesaid agreements and of the acts of said respondent in the performance thereof are, and have been, to unduly restrain, lessen, suppress and injure competition in the interstate sale, lease, rental and distribution of commercial or advertising films, and to unduly hinder and prevent competing producers, sellers and distributors of commercial or advertising films from selling, leasing, renting and distributing such films from the various States of the United States, where said producers, sellers and distributors are located, to and into various other States where motion picture exhibitors are located, and to monopolize in said respondent the sale, lease, rental and distribution of commercial or advertising films in commerce as herein set out.

16 As a further effect of the aforesaid agreements, advertisers or prospective advertisers, who, in their respective marketing areas, have sought to obtain motion picture film advertising through said other film distributors, have been compelled, as a result of the restrictive provisions of said agreements, either to place their business with respondent or to forego this type of advertising.

Paragraph Six. The acts and practices of respondent, as herein alleged, are all to the prejudice of competitors of said respondent

and of the public; have a dangerous tendency to hinder and prevent, and have actually hindered and prevented competition in the selling, leasing, renting and distributing of commercial or advertising films in commerce within the intent and meaning of the Federal Trade Commission Act; have unreasonably restrained such commerce in commercial or advertising films, and have a dangerous tendency to create in respondent a monopoly in certain areas of the United States in the selling, leasing, renting and distributing of such films, and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Wherefore, The Premises Considered, The Federal Trade Commission on this 26th day of May A. D. 1947, issues its complaint against said respondent.

NOTICE

Notice is hereby given you, Motion Picture Advertising Service Company, Inc., a corporation respondent herein, that the
17 11th day of July A. D. 1947, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the City of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of law charged in the complaint.

You are notified and required, on or before the 20th day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule VIII) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

Failure of the respondent to file answer within the time above provided, and failure to appear at the time and place fixed
18 for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all of the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer, the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief directed solely to that question, in accordance with Rule XXIV.

Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments, offers of settlement or proposals of adjustment where time, nature of the proceeding and the public interest permit, and due consideration shall be given to the same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer.

In Witness Whereof, the Federal Trade Commission has
19 caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 26th day of May A. D. 1947.

By the Commission:

Otis B. Johnson,
(OTIS B. JOHNSON),
Secretary.

Before Federal Trade Commission

[Title omitted.]

Answer of respondent Motion Picture Advertising Service Company, Inc.

Received June 16, 1947

The respondent, Motion Picture Advertising Service Company, Inc., by Louis L. Rosen, its attorney, makes the following answer to the Complaint of the Federal Trade Commission, dated May 26, 1947:

FIRST DEFENSE

Respondent avers that on March 19, 1942, the Federal Trade Commission filed complaint in the matter of "Screen-Broadcast

Corporation, et al., Docket No. 4736" against this respondent and the other respondents therein named, and alleged in Paragraph Four, subparagraph (a) as follows:

20 "The respective respondent distributors entered into individual contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theater or theaters owned or controlled by the said exhibitors for a specified period of time, usually for five years."

This respondent, Motion Picture Advertising Service Company, Inc., answered said allegation as follows:

"Respondents admit the allegations of subparagraph (a) of Paragraph Four of the Complaint, except that respondents deny that all such contracts provide for the exclusive right to display motion picture advertising films in the theatre with which such contract is made, whereas, on the contrary the vast majority of such contracts with motion picture theatres are non-exclusive in character, and respondents further deny that such contracts with theatres are usually for a period of five years."

Respondent further avers that after a full and complete hearing upon this issue, the Federal Trade Commission refused to order this respondent (and the other respondents therein named) to cease and desist from entering into individual contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertisng motion picture films for the theater or theaters owned or controlled by the said exhibitors. Accordingly, respondent avers that the only issue involved in this complaint, Docket No. 5498, has been fully and, finally determined in respondent's favor in proceedings had under the former complaint, Docket No. 4738 and, therefore, said issues is res adjudicata and, accordingly, this complaint should be dismissed.

21 SECOND DEFENSE

And now, with full reservation of the plea of res adjudicata, for answer to the allegations of said complaint respondent avers:

Paragraph One. Respondent admits all of the facts alleged in Paragraph One.

Paragraph Two. Respondent admits all of the facts alleged in Paragraph Two, except that respondent denies that it is one of the largest producers and distributors of commercial or advertising films in the United States.

Paragraph Three. Respondent admits the facts alleged in Paragraph Three.

Paragraph Four. Respondent denies the facts alleged in Paragraph Four except as herein specially admitted.

Further answering the allegations of said Paragraph Four, respondent avers that in or about the year 1937, and from time to time thereafter, said respondent has entered into screening agreements with various motion picture exhibitors under which each respective exhibitor agrees during the term of his contract to properly display for respondent on the screens of theaters listed in said contract the number of advertising films specified therein, and further agrees to display only advertising films furnished by respondent during the limited term of said contract, in consideration whereof respondent pays the exhibitor at a stipulated
22 rate for the service rendered by said exhibitor in displaying respondent's advertising films; that such an agreement is known and designated as "Theatre Screen Agreement," and provides in part:

"The Exhibitor agrees to properly display for 'MPA' a maximum of six ads per performance per week, equal to not over three hundred sixty feet at a time, on the screens of theatres listed below, and at the rates per ad per week specified below. * * * 'MPA' will include with each shipment of film, screening instructions showing the names of the advertisers and the week during which films are to be displayed. Should an omission occur in the display, Exhibitor agrees to immediately notify 'MPA'; and further agrees to display only advertising films furnished by 'MPA', excepting films or slides for charitable or governmental organizations or announcements for Exhibitor's present and future attractions of the theatres."

Respondent avers that said contracts are legal in all respects.

Paragraph Five. Respondent denies the facts alleged in Paragraph Five.

Further answering said paragraph, respondent avers that there are approximately 18,765 theaters operating in the United States with a total seating capacity of 11,400,000, and that respondent has exclusive theater screening agreements with only a small percentage of the theaters having a small percentage of the seating capacity. Respondent specially denies that its exclusive theater screening agreements restrain, lessen, suppress, and injure
23 competition in the interstate sale, lease, rental and distribution of commercial and advertising films, or hinder or prevent competing producers, sellers, and distributors of commercial and advertising films from selling, leasing, renting and distributing such films in the various states of the United States. Respondent avers that there is active and substantial competition among distributors in securing theater screening agreements with

xhibitors. Respondent further avers that respondent encourges advertisers to have their films produced by other producers, nd respondent accepts for distribution and exhibition films produced by other producers, subject only to the condition that such lms measure up to the standards required by the exhibitors. Respondent specially denies that advertisers and prospective advertisers have been compelled to place their business with respondent, or to forego this type of advertising, and avers that espondent has heretofore accepted and continues now to accept ron other film producers, and from advertisers or their advertising agencies throughout the United States booking orders for he exhibit of films for advertisers who desire their films produced by others, and who desire to display said films on screens nder exclusive contracts with respondent.

Paragraph Sixth. Respondent denies all of the allegations ntained in Paragraph Sixth.

Wherefore, respondent, Motion Picture Advertising Service ompany, Inc., prays that the Complaint against it be dismissed.

LOUIS L. ROSEN,
Attorney for Respondent, Motion Picture Advertising Service Company, Inc.

Office and postoffice address of said attorney: 1801 Hibernia Bank Building, New Orleans, Louisiana.

Note re answer, orders, application and notices

Answer of Floyd O. Collins, to Application of Louis L. Rosen, tty., for Postponement of Hearing;

Order of Federal Trade Commission Postponing Commencent of Hearings;

Order of Federal Trade Commission appointing Frank Hier, rial Examiner;

Order dated 8/4/47 of Trial Examiner Setting Hearing for retrial Conference;

Application of Motion Picture Advertising Service Co., Inc., r Oral Argument on Plea of Res Adjudicata;

Order of Federal Trade Commission Rescinding Order of 27/47 and Directing the Commencement of Hearings to begin 9/29/47;

Notice of Trial Examiner to all Counsel relative to the Commencement of Hearings to begin on 9/27/47;

Notice of Federal Trade Commission relative to time and place r Oral Argument on Plea of Res Adjudicata;

Authorities submitted by Counsel of Respondents to Federal Trade Commission, dated 9/20/47 re Pleas of Res djudicata;

25 Authorities submitted by Counsel supporting the Com-
plaint to Federal Trade Commission, filed 9/23/47, re Find-
ings of Fact;

Order of Frank Hier, Trial Examiner canceling Hearings;

Omitted from the Printed Record, pursuant to Petitioner's Des-
ignation as to Printing Record, copied at page 1.

* * * * * *

Before Federal Trade Commission

[Title omitted.]

Order denying plea of res judicata

February 20, 1948

This matter came on to be heard in regular course upon
26 the motion of September 9, 1947, by respondent for hearing
upon its plea of res judicata, the answer to said motion filed
September 12, 1947, by counsel supporting the complaint, and
oral argument had before the Commission on said motion. Hav-
ing duly considered the matter, and for the reasons stated in the
opinion filed herein:

It Is Ordered that respondent's plea of res judicata as a defense
in this proceeding be, and the same hereby is, denied.

By the Commission:

[SEAL]

Otis J. Johnson,
(Otis B. Johnson),
Secretary.

Before Federal Trade Commission

Docket No. 5498

In the Matter of Motion Picture Advertising Service Com-
pany, Inc., a corporation.

Opinion on plea of res judicata

February 20, 1948

At a regular session of the Federal Trade Commission, held at
its office in the City of Washington, D. C., on the 20th day of
February A. D. 1948. Commissioners: Robert E. Freer, Chair-
man, Garland S. Ferguson, Ewin L. Davis, William A. Ayres,
Lowell B. Mason.

In its answer to the complaint herein respondent Motion
27 Picture Advertising Service Company, Inc., pleaded res judicata as a defense to this proceeding, contending that the issues herein were decided in Docket 4736, Screen Broadcast Corporation, et al.

The Commission is of the opinion that in a proceeding such as this the doctrine of res judicata is inapplicable. This view is based upon the provisions of the statute under which this proceeding is brought, the nature and character of proceedings by this Commission, and the primary importance of the interest of the public.

In this case the decision is not rested on the general grounds stated above, for even if the principle were applicable the present plea would be without merit because the issues in this proceeding were not decided in Docket No. 4736. In the former proceeding Motion Picture Advertising Service Company, Inc., and a number of other respondents were charged with having entered into and carried out a combination and conspiracy which had the results of unreasonably restraining trade and commerce in commercial or advertising motion picture films and tending to create in said respondents a monopoly in the sale, lease, rental, and distribution of such films. Among the numerous overt acts alleged to have been done pursuant to and as a means of effectuating the purposes of such combination and conspiracy was the following:

The respective respondent distributors entered into individual contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films in the theater or theaters owned or controlled by the said exhibitors for a specified period of time, usually for five years.

28 In the present proceeding respondent is individually charged with having entered into long-term screening arrangements with numerous motion picture exhibitors under which respondent acquired the exclusive privilege of exhibiting commercial or advertising films produced or distributed by it in the theaters owned or controlled by such exhibitors and under which each exhibitor agreed not to display commercial or advertising films other than those furnished by respondent. It is further alleged that the effect of said agreements is to suppress and injure competition in the interstate sale, lease, rental, and distribution of commercial or advertising films and unduly to hinder and prevent competing producers, sellers, and distributors of commercial or advertising films from selling, leasing, renting and distributing such films in commerce.

In the first proceeding the gravamen of the offense charged was the combination and conspiracy to do and the doing of certain

acts pursuant to such combination and conspiracy. The acts charged as a violation of law in the present proceeding are the individual acts of respondent not charged as having been done pursuant to any agreement or understanding with others. The difference between the issues in the two proceedings is therefore apparent.

Respondent further contends, however, that if the issues created by the pleadings in Docket 4736 were not identical with the issues in the present proceeding, they were, nevertheless, made identical because counsel supporting the complaint in the first proceeding, in his brief upon the merits, sought the issuance of an order
29 to cease and desist which included a provision against any respondent therein individually and without agreement with other respondents entering into contracts with motion picture exhibitors for the exclusive right of exhibiting commercial or advertising films in the theaters owned or controlled by such exhibitors. The provision contained in the order actually issued by the Commission prohibited respondents from entering into such contracts pursuant to agreement and understanding with any of their correspondents. In that proceeding the Commission could not lawfully have entered an order against the respondents individually. The Commission has sole authority under the statute to issue complaints stating its charges. The fact that an attorney supporting a complaint seeks, argues, or contends for some position does not alter or modify the issues originally tendered by the complaint and to which the Commission must adhere unless such issues are subsequently changed through affirmative action by the Commission amending the complaint.

Order denying respondent's plea of res judicata will be entered.

By the Commission:

Note re orders and notices

Order of Federal Trade Commission substituting Earl J. Kolb, Trial Examiner, and fixing time and place for Taking Testimony;

Order of Earl J. Kolb, Trial Examiner, dated 3/12/48 postponing the Commencement of Hearings;

Notice of Earl J. Kolb, Trial Examiner, dated 3/16/48 of Hearings;

30 Notice of Earl J. Kolb, Trial Examiner, dated 7/7/48 to Counsel of hearing;

Notice of Earl J. Kolb, Trial Examiner, dated 8/17/48 to Counsel of hearing;

Notice of Earl J. Kolb, Trial Examiner, dated 10/26/48 to Counsel of Hearings;

Order of Earl J. Kolb, Trial Examiner, Postponing Hearing, dated 12/28/48;

Order of Earl J. Kolb, Trial Examiner, Extending time for filing Proposed Findings and Conclusions;

Omitted from the Printed Record, pursuant to Petitioner's Designation as to Printing Record, copied at page 1.

* * * * * *

31 Before Federal Trade Commission

[Title omitted.]

Proposed findings and conclusions before trial examiner under Rule XXI of the Rules of Practice Before the Federal Trade Commission

Received March 14, 1949

Now comes Motion Picture Advertising Service Company, Inc., Respondent herein, and pursuant to Rule XXI of the Rules of Practice before the Federal Trade Commission requests the Honorable Earl J. Kolb, Trial Examiner in this proceeding, to make the following findings and conclusions, to wit:

Proposed findings of fact

1. On or about the 26th day of May 1947, the Federal Trade Commission, proceeding under Section 5 of the Federal Trade Commission Act, issued its Complaint herein in which, in substance, it charged the Respondent with engaging in unfair methods of competition by entering into long term exclusive screening agreements with various motion picture exhibitors, the tendency of which is unduly to restrain competition in interstate commerce and to monopolize the distribution of commercial or advertising films in such commerce.

32 (Note.—Figures in parentheses refer to pages of the record in Docket No. 5498.)

2. Respondent duly answered the Complaint alleging as a First Defense that the issue presented is "res judicata" on the ground that the same issue between the same parties was presented in the matter entitled: "Screen Broadcast Corporation, et al.," Docket No. 4736, against this Respondent and the other Respondents therein named. In Paragraph Four, subparagraph (a) of the Complaint in said proceeding, the Federal Trade Commission alleged:

"The respective Respondent distributors entered into individual contracts with moving picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture

films in the theatre or theatres owned or controlled by the said exhibitors for a specified period of time, usually for five years."

This Respondent in proceeding No. 4736 answered said allegation as follows:

"Respondents admit the allegations of subparagraph (a) of Paragraph Four of the Complaint except that Respondents deny that all such contracts provide for the exclusive right to display motion picture advertising films in the theatre with which such contract is made, whereas, on the contrary the vast majority of such contracts with motion picture theatres are nonexclusive in character, and Respondents further deny that such contracts with theatres are usually for a period of five years."

33 In connection with said plea of "res judicata," Respondent further averred in its answer in this proceeding, that after a full and complete hearing in proceeding 4736 upon this issue the Federal Trade Commission refused to order this Respondent (and the other Respondents therein named) to cease and desist from entering into individual contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising motion picture films for the theatre or theatres owned or controlled by the said exhibitors, and, accordingly, that the only issue involved in this Complaint, Docket No. 5498, has been fully and finally determined in Respondent's favor in proceedings had under the former Complaint, Docket No. 4736 and, therefore, that said issue is "res judicata," and that this Complaint should be dismissed.

As a Second Defense in its answer, Respondent denied that the capacity, tendency and effect of exclusive theatre screening agreements have been to unduly restrain, lessen, suppress and injure competition or to create in Respondent, or tend to create, a monopoly in the sale, lease, rental and distribution of commercial or advertising films in commerce; or that the acts and practices of Respondent are to the prejudice of competitors of Respondent, or to the prejudice of the public. Respondent specially denied that its acts or practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

34 The plea of "res judicata" was overruled by the Commission, and the case thereupon tried on its merits.

3. Testimony and other evidence were introduced by the Commission and the Respondent before a duly designated Trial Examiner, and such testimony and evidence were duly recorded and filed in the office of the Commission.

4. Respondent is a corporation which was organized under the laws of the State of Louisiana in September 1921, with its office and principal place of business in New Orleans, Louisiana (565).

5. From September 1921 to June 1925, the Company acted as a distributor of advertising films. In June 1925, Respondent organized its own studio and became a producer of films, and since that time has been engaged in the business of producing, selling, leasing, renting and distributing motion picture advertising films to or on the order of advertisers and other distributors of motion picture advertising films, and furnishing a display service by causing the exhibition of such films in theatres under screening agreements between Respondent and theatre owners. Respondent does business in 28 states (565).

6. Before the advent of motion picture advertising, theatres exhibited advertising on "drop curtains" which were lowered between performances or between acts. On these curtains were painted advertisements which produced a supplementary source of income to the theatres, the privilege of placing advertisements thereon being leased or let to some one sign company or painter (566). Advertising on theatre screens has developed from the original use of slides to black and white short films without life action or animation or sound, seasonal films, short life action films, reader type or tintype pictures, to the present standard practice, which consists of the exhibition of 35 mm. life action or cartoon animation (or a combination of both) in black and white or color, with sound accompaniment (370–373; 565–566).

7. There are in the United States at least 28 producers and distributors of 35 mm. film advertising playlets, and at least 265 producers (who are not distributors) of 35 mm. film advertising playlets (Alexander Film Company's Exhibits 5 (a) to 5 (i) inclusive, and Exhibit 6) (488).

8. The motion picture advertising business is divided into three categories, namely, local advertising, manufacturer-dealer or cooperative advertising (448–456) and national advertising (456–458).

9. Local advertising consists of the exhibition of screen films for local merchants in local theatres, and the films used for this purpose are known as "library films" (514, 568, 578).

10. Manufacturer-dealer or cooperative advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications, and the costs of production of the playlets, including the master film or negative, and the prints are borne by the manufacturer; and the cost of exhibiting the films is usually borne by the manufacturer or is shared by the manufacturer and his dealers, the manufacturer's distributors (middlemen between the manufacturer and his dealers) also sometimes sharing in distribution costs (448–457).

11. National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications, the costs of production and exhibition of which are borne exclusively by the manufacturer (457–460).

12. Library films for local advertising consist of a series of playlets advertising various lines of business. Respondent carries in its library a stock of films that advertise forty lines of business. These library films provide the local advertiser with ready-made motion pictures for the advertising of his particular business. Since these films are not specialized for any particular advertiser, they are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets. Library film is a playlet 40 feet in length, in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment. The name trailer is 20 feet in length and the over-all length of the film is 60 feet, the screening time of which is 40 seconds. Within the territory in which Respondent operates, its sales force regularly calls upon local advertising customers and offers to them its library film advertising service. Respondent's contracts with local advertisers call for the display of particular library films on designated theatre screens under contract with Respondent, usually on a weekly or alternate weekly basis for a period of one year but in no instance for less than thirteen weeks (439, 514, 577, 578).

37 13. Specially produced films for manufacturer-dealer or cooperative advertising programs advertise merchandise, products, and service of a national manufacturer. They are playlets 40 feet in length, in black and white color, with life action or cartoon animation (or a combination of both) and sound accompaniment; and to the playlet is added a 20-foot trailer depicting, among other things, the name of the dealer who is identified with the advertising message in his particular trade area. The over-all length of the film is 60 feet and the screening time is 40 seconds. These specialized films and playlets may or may not be produced by Respondent. Customarily, the manufacturer deals with one distributor in arranging for the initiation and execution of the advertising campaign, but not always. Usually, the distributor selected by the manufacturer is not alone able to provide the advertiser with the full coverage that he desires. Accordingly, the originating distributor who has the contract with the manufacturer enlists the aid of other distributors who have available theatre outlets. Through rate books, or other sources of information, the originating distributor knows of the theatres available throughout the territory to be blanketed by the advertising program, and of the theatre screening rates, and knows

further that a fair average of such other theatres will be prepared to exhibit the playlets. When the originating distributor has in hand the required information respecting the coverage that he can assure and of the overall costs of exhibition, he reports to the manufacturer or advertising agency, receives approval, and proceeds to execute the program. The originating distributor's salesmen and the salemen for the codistributors sell the
38 program to the advertiser's dealers for use in the theatres where the respective distributors have screening rights, and in due course the program is launched in this widespread territory. The number of dealers may be as many as 5,000, and a substantial portion of the dollar volume of the motion picture advertising business is executed through these manufacturer-dealer or cooperajtive programs (409–411, 515).

14. Specially produced films for national advertising are playlets that advertise the merchandise, products, and service of a national manufacturer that may be handled by numerous retailers in a given trade territory, and hence it is impracticable for the retailer to participate in the distribution costs. Usually, the playlets do not carry any dealers' name trailers. The playlets are 90 feet in length (minute movies), but may run to 120 or 130 feet, are in black and white or color, with life action or cartoon animation (or a combination of both) and sound accompaniment. Respondent is a distributor of this type of advertising through the theatres which it has under contract, and the national advertiser or its advertising agency has available a list of theatres under contract with Respondent and a schedule of Respondent's screening rates. Most of the advertising playlets are produced by concerns other than Respondent (411, 516–518).

15. Respondent's business is divided into five departments:

(a) A Production Department that produces a library or syndicated service and also special films ordered by particular advertisers;

39 (b) A Service Department whose responsibility is to ship the films to the theatres and receive them back from the theatres;

(c) An Accounting Department which keeps all of the records of the Company;

(d) A Sales Department which handles the sale of advertising; and

(e) A Theatre Procurement Department which handles the securing of theatre screening privileges with theatres (568–569).

16. The film libraries represent substantial investments, Alexander Film Company's running to about three-quarters of a million dollars. The annual cost of library production of Respondent

runs to more than $300,000 (578). The libraries are kept current to changes of style and these recurrent outlays run into substantial sums. The cost of producing a black and white negative is from $2.00 to $3.00 per foot, and a color negative approximately double that amount (407). Prints cost approximately 3 cents a foot for black and white, and double that amount for color (408). The cost of manufacturer-dealer playlets for a year's display may run to several thousand dollars (1111).

17. Theatre screening agreements made between Respondent and various theatres are divided into two general classes: nonexclusive contracts and exclusive contracts. Under a nonexclusive contract the screen is open to more than one distributor at
40 the same time; whereas, under an exclusive contract, only one distributor is permitted to show advertising on the theatre screen during the term of the contract (except that the theatre will generally run out to completion advertising contracts of other distributors which have been sold to the advertiser previous to the execution of the exclusive contract). Respondent in common with other film advertising distributors has, from the very beginning of the industry (596), solicited and obtained some exclusive theatre screening agreements for reasonable periods of time, the term ranging from one to a maximum of five years (568–570).

18. Respondent must have a nucleus of exclusive screening agreements with theatres in order to sell to local advertisers its library film service (577–578).

19. Respondent must have a nucleus of exclusive screening agreements in order to sell manufacturer-dealer or cooperative programs (515–516).

20. Respondent must have a nucleus of exclusive theatre screening agreements in order to sell national advertising programs (820–821; 1100–1103).

21. Respondent must have a fairly representative number of assured theatre outlets to justify its large investments in libraries of films, in the large periodical outlays for keeping its library films current, and in the large costs represented by its productive and promotional organization. It must assure screening space for its customers and to that end must have a nucleus of theatre outlets or service where and when required, time often being very much of the essence (550, 578, 619).

41 22. Because of prohibitive costs it is not economically advantageous for a local merchant to have a special playlet made for his individual use (1102).

23. A film ad distributor cannot run the risk inherent in a guaranty of minimum revenue to the theatre owner without securing a compensating right of availability of theatre screens (735–736).

24. Film advertising contracts should run for at least a year to produce the desired cumulative advertising impressions (406–407). A year's advertising contract has thus become standard practice (406–407). While actual exhibitions of an advertiser's program may be on a weekly basis, biweekly showings are common, although exhibitions every third or fourth week are not uncommon. Advertising contracts limited to 13 weeks are becoming something of a rarity, a "teaspoon taste" (406). And in order for the advertising campaign to be effective there is generally a follow-up campaign after the expiration of the first year's advertising contract (855).

25. Between the taking of an advertising contract, particularly a manufacturer-dealer or cooperative contract, and the beginning of the screening of the advertising, several months must elapse for the production and approval of the advertising film, the solicitation of dealers and the allocation and coordination of screen time (853).

26. It is standard practice to allow a distributor to run out its advertising (which has been sold to the advertiser prior to the expiration of its theatre screening agreement) after the ex-
42 piration of the old theatre contract, and thus its successor finds that only a fraction of the screen space for which it has contracted will be available for several months after the new contract term commences (853). A screen is not fully available until fourteen to fifteen months after the commencement of the contract (1115). On a library service, it takes about sixty days to get the local advertiser's contract started. Moreover, many types of advertising, especially of national advertising (including manufacturer-dealer programs) are not screened until after the lapse of several months succeeding the making of the advertising agreements. In these cases, it takes six months to produce the special film and to contact dealers of the manufacturer (1116–1117).

27. Respondent has two general types of theatre screening contracts shown in the record as Commission's Exhibits 21 and 22 (335). The forms of contract contain the exclusive clause and contain the words "five years" as to the term of the contract, but in cases where the contract is nonexclusive, the exclusive clause is deleted, and in cases where the term is less than five years, the word "five" is stricken and the appropriate word is inserted in its place (573).

28. In January of 1925 Respondent had theatre screening agreements with 300 theatres in the States of Mississippi, Louisiana and a part of Alabama. In January of 1945 Respondent had theatre screening agreements with 3,000 theatres in twenty-eight states, and between January 1945 and the Summer of 1948, Respondent

obtained theatre screening agreements with an additional
43 1,500 theatres. During 1948 contracts with more than 3,000 theatres expired. An average of about one-third of the theatre screening agreements expire each year (572–573).

29. There were approximately 20,306 theatres in the United States on August 1, 1947, and about 12,676 exhibited film advertising. At that time Respondent had agreements with 4,096, of which 2,493 contained the exclusive clause. The term of the agreements runs from one to a maximum of five years (Commission's Exhibit 1) (575–576).

30. There is free, open, active and substantial competition among film advertising distributors for the securing of theatre screening agreements. Theatres frequently change distributors at the termination of contracts. There is also free, open, active and substantial competition in the acquisition of advertising contracts and in the production of advertising films (578–579).

31. Respondent, in line with common practice, makes its screens available to competing film distributors; provided, only, that the screens shall not be loaded beyond the extent permitted by the theatres, that the films shall be of standard length, and that the quality of films shall meet the standards of the theatres (603–617). In such instances Respondent pays a standard American Association of Advertising Agencies' commission of 15% plus 2% cash discount (605).

32. Screening space is severely limited. Thus, out of some 20,306 motion picture theatres in the United States, about
44 40 per cent do not accept film ads (Commission's Ex. 1). Motion picture shows commonly are limited to two per day, with a possible matinee on Sunday, and the shows run for two to two and a half hours. Theatre patrons, potential customers of the advertisers, who pay admission for entertainment, resent the showing of too much film advertising, and thus impose natural limitations on the number of ads that may be run by theatres, the number varying from three to six ads, or an overall of two, three or four minutes, or, from two per cent to four per cent of the time consumed by each show. In this respect motion picture advertising differs radically from newspaper and magazine advertising, which is limited only by the availability of newsprint and normally occupies some 60 per cent of the overall newspaper or magazine space, and differs materially from radio advertising, which may allow 20 per cent of radio time for commercials (1098–1100).

33. Film advertising affords the theatre owner a desirable source of extra revenue, and furnishes advertisers a highly effective medium for the promotion and sale of their products and services (449, 766).

34. Owners of many theatres insist upon limiting theatre screen advertising to one distributor.

35. Many theatres enter into exclusive screening agreements with film advertising distributors for the following reasons, to wit:

(a) To afford better control of theatre screens as respects audience acceptance, and as respects confusion, chaos and revenue loss from a screen overload one week, and a screen underload the next week.

45 (b) To prevent misunderstandings with advertisers.

(c) To enhance screen rentals.

(d) To eliminate complicated bookkeeping procedure.

(e) To enable theatre owners to control film advertising through reliable distributors who will give sufficient service and promptly pay their bills.

(f) To enable theatre owners to control the quality of the advertising films shown on their screens.

(g) To enable theatre owners to insist upon minimum guarantees (639–656) (656–667) (667–680) (718–741) (741–753) (753–768) (788–793) (842–852) (884–907) (907–926) (950–968) (1010–1028) (1028–1035) (1043–1049) (1049–1053) (1065–1085) (1085–1096).

36. The quality of advertising films is a very important competitive factor in the firm advertising business (878884).

37. Respondent's competitors who testified on behalf of the Commission have lost out in competition, not because of the existence of exclusive theatre screening agreements, but because of the inferior quality and character of their films, their lack of sales organization, and their failure to pay the theatres in accordance with their contracts (680–700) (968–989).

46 38. Many theatre owners would rather forego the supplementary source of income derived from screen advertising if required to exhibit films for more than one distributor at the same time (1072) (1034).

39. National advertisers and their advertising agents could not use the medium of screen advertising unless they were assured of space for the display of their special films manufactured at considerable cost to the manufacturer (1096–1112).

40. No film advertising distributor has ever succeeded in business without some exclusive theatre screening agreements (607).

Proposed conclusions

1. That the Federal Trade Commission does not have jurisdiction in these proceedings because the securing of theatre screening agreements does not involve interstate commerce.

2. That the Federal Trade Commission does not have jurisdiction in these proceedings because the interest of the public is not involved within the meaning and intent of Section 5 of the Federal Trade Commission Act.

3. That Respondent's plea of "res judicata" should have been sustained, because of the Commission's prior adjudication of the sole issue involved herein, in Docket No. 4736.

4. That Respondent, in common with other film adver-
47 tising distributors since the beginning of the industry, has entered into exclusive theatre screening agreements running for a term of from one to a maximum of five years.

5. That the film advertising business cannot be successfully conducted without some exclusive theatre screening agreements.

6. That there is open, free, active and substantial competition in the solicitation and acquisition of theatre screening agreements and the renewals thereof.

7. That those theatre owners or exhibitors who enter into exclusive theatre screening agreements are not willing to license their screens for the exhibition of motion picture advertising films to more than one distributor at the same time.

8. That the length of time of Respondent's theatre screening agreements are not longer than business necessity requires, and are therefore reasonable.

9. That the evidence herein is insufficient to sustain the allegations of the Complaint.

10. That Respondent's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not constitute an unfair method of competition in commerce, and the interest of the public is not involved, within the meaning and intent of Section 5 of the Federal Trade Commission Act.

11. That Respondent's exclusive theatre screening agree-
48 ments with motion picture theatres for the display of film advertising do not unduly restrain, lessen, suppress, or injure competition in the interstate sale, lease, rental or distribution of advertising films, and do not unduly hinder or prevent competing producers, sellers and distributors of advertising films from selling, leasing, renting or distributing such films, and do not monopolize in said Respondent the sale, lease, rental or distribution of advertising films in commerce.

12. That Respondent's exclusive theatre screening agreements with motion picture theatres for the display of film advertising do not have a tendency to hinder or prevent and have not actually hindered or prevented competition in the sale, lease, rental or distribution of advertising films in commerce, with the meaning and intent of the Federal Trade Commission Act; and have not unreasonably restrained such commerce in advertising films, and

do not have a tendency to create in Respondent a monopoly in the sale, lease, rental or distribution of such films, and do not constitute unfair methods of competition in commerce within the meaning and intent of Section 5 of the Federal Trade Commission Act.

13. That the Complaint herein is dismissed.

Reasons and authorities sustaining the proposed findings and conclusions

Conclusion 1: (a) Exhibition of motion picture films is intrastate business.

49 Mutual Film Corp. v. Industrial Commission, 236 U. S. 230; 59 L. Ed. 552,

Boynton v. Fox West Coast Theatre Corp., 60 Fed. (2d) 851,

Tad Sereen Advertising Co. v. Oklahoma Tax Commission, 126 Fed. (2d) 544, even where interstate commerce is incidentaliy affected.

Foster & Kleiser Co. v. Special Site Co., 85 Fed. (2d) 742, Certiorari denied: 299 U. S. 613; 81 L. Ed. 453.

Lipson v. Socony-Vacuum Corp., 87 Fed. (2d) 265.

Moore v. New York Cotton Exchange, 270 U. S. 593; 70 L. Ed. 750.

Jewell Tea Co. v. Williams, 118 Fed. (2d) 202.

(b) The relationship between the Respondent and the theatre owners is one of agency, and hence subject to exclusive contracts,

Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568; 67 L. Ed. 408,

Pick Mfg. Co. v. General Motors Corp., 80 Fed. (2d) 641. Aff. 229 U. S. 3; 81 L. Ed. 4,

50 Brosius v. Pepsi Cola Co., 155 Fed. (2d) 99, or a permissible exclusive lease of screen space.

U. S. v. Western Union Tel. Co., 53 F. Supp. 377,

Goldberg v. Tri-States Theatre Corp., 126 Fed. (2d) 26.

Conclusion 3. The doctrine of res judicata is applicable to administrative proceedings of the Federal Trade Commission.

U. S. v. Willard Tablet Co., 141 Fed. (2d) 141. Lee v. Federal Trade Commission, 113 Fed. (2d) 583.

And see briefs considered by the Commission on motion for dismissal.

Conclusions 2, 10, 11 and 12 go to the merits of the case in the light of the Record evidence. Authorities in support of these four Conclusions may be classified as follows:

(A) EXCLUSIVE CONTRACTS ARE NOT ILLEGAL PER SE.

Pick Mfg. Co. v. General Motors Corp., 80 Fed. (2d) 641. Aff. 299 U. S. 3; 81 L. Ed. 4.

Moore v. New York Cotton Exchange, 270 U.S. 593; 70 L. Ed. 750.

U. S. v. Columbia Steel Cor., 92 L. Ed. 1173, 1188, 1189, 1191.

(b) Hence are illegal only if they operate in unreasonable restraint of trade or tend unduly toward monopoly.

51 Standard Oil Co. v. U. S., 221 U. S., 1; 55 L. Ed. 619.

Fashion Originators Guild v. Federal Trade Commission, 312 U. S. 457; 85 L. Ed. 949.

(c) The terms "restraint of trade" and "monoply" are used in the Sherman Act in their common-law connotation.

Apex Hosiery Co. v. Leader, 310 U. S. 469, 497–499, 84 L. Ed. 1311, 1325–1327.

(d) The reasonableness of Respondent's challenged practices depends upon all of the facts and circumstances that constitute the background of the practices.

Sugar Institute, Inc. v. U. S., 297 U. S. 553; 80 L. Ed. 859.

Appalachian Coals, Inc. v. U. S., 288 U. S. 344; 77 L. Ed. 825.

Board of Trade v. U. S., 246 U. S. 231; 62 L. Ed. 683.

Gary Theatre Co. v. Columbia Pictures Corp., 120 Fed. (2d) 891.

Westway Theatre v. 20th Century-Fox Film Corp., 30 F. Supp. 830. Aff. 113 Fed. (2d) 952.

(e) A trader may select the persons with whom he will deal, and, in the absence of a purpose to restrain or monopolize business, the terms upon which he will deal with them.

52 U. S. v. Trans-Missouri Freight Ass'n., 166 U. S. 290; 41 L. Ed. 1007.

Eastern States Retail Lumber Dealers Ass'n. v. U. S., 234 U. S. 600; 38 L. Ed. 1490.

U. S. v. Colgate Co., 250 U. S. 300; 63 L. Ed. 992.

Federal Trade Commission v. Gratz, 253 U. S. 421; 64 L. Ed. 993.

(f) The Findings of Fact submitted in the foregoing proposals, fully supported by the Record, establish the following reasons justifying the taking of theatre contracts that are exclusive for limited reasonable periods of time:

First. The solicitation and acquisition of theatre screening contracts, and the renewals thereof, and of film advertising contracts, are highly competitive activities.

Second. Unless motion picture advertising business is to be outlawed in its essential functions, the taking of a fairly representative nucleus of exclusive screening contracts is necessary.

Third, The terms of Respondent's theatre screening contracts are not longer than business necessity dictates for the execution of an effective advertising program.

(g) The foregoing facts establish that Respondent's
53 practices as respects exclusive theatre screening contracts, and the duration thereof, are reasonable under authorities classified as follows:

First. Covenants of the seller not to compete with his buyer for a reasonable time within the buyer's trade area.

Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179; 50 L. Ed. 428.

Darius Cole Transportation Co. v. White Star Line, 186 Fed. 63.

U. S. v. Paramount Pictures, 66 F. Supp. 323, 341.

Second. Covenants of an employee not to compete with his employer for a reasonable time and within a reasonable area after his employment ceases.

Mark v. Ervin Press Corp., 48 Fed. (2d) 152.

Bausch & Lomb Optical Co. v. Wahlgren, 1 Fed. Supp. 799.

Third. Covenants of a landlord not to allow a competitor of his tenant to carry on a business competitive with the business of the tenant in the building in which the tenant leases quarters.

Goldberg v. Tri-States Theatre Corp., 126 Fed. (2d) 26.

U. S. v. Western Union Tel. Co., 53 F. Supp. 377.

Fourth. Exclu ive sales agencies.

54 Federal Trade Commission v. Curtis Publishing Co., 260 U. S. 568, 580; 67 L. Ed. 408, 413.

Pick Mfg. Co. v. General Motors Corp., 80 Fed. (2d) 641. Aff. 299 U. S. 3; 81 L. Ed. 4.

Brosius v. Pepsi-Cola Co., 155 Fed. (2d) 99.

Fifth. Exclusive dealer agreements requiring the dealer to handle the distributor's products in dispensing equipment furnished by the distributor.

Federal Trade Commission v. Sinclair Refining Co., 261 U. S. 463; 67 L. Ed. 746.

Standard Oil Co. v. Federal Trade Commission, 273 Fed. 478.

Lipson v. Socony-Vacuum Corp., 87 Fed. (2d) 265.

Sixth. Motion picture "clearance cases."

Schine Chain Theatres v. U. S., 92 L. Ed. 871; 874 Note 6.

U. S. v. Paramount Pictures, Inc., 92 L. Ed. 883, 892, Note 6.

Westway Theatre Inc. v. 20th Century-Fox Film Corp., 30 F. Supp. 830. Aff. 113 Fed. (2d) 32.

Seventh. Miscellaneous cases.

(i) Chicago, St. Louis & N. O. R. R. Co. v. Pullman Southern Car Co., 139 U. S. 79; 35 L. Ed. 97.

55 (ii) Donovan v. Pennsylvania Co., 199 U. S. 279; 30 L. Ed. 192, (Still recognized as good law—U. S. v. Yellow Cab Co., 322 U. S. 218, 229, 91 L. Ed. 2010, 2019).

(iii) Moore v. New York Cotton Exchange, 270 U. S. 593, 70 L. Ed. 750.

(iv) Pick Mfg. Co. v. General Motors Corp., 80 Fed. (2d) 641. Aff. 229 U. S. 3; 81 L. Ed. 4.

(v) U. S. v. Western Union Tel. Co., 53 F. Supp 377.

The "Proposed Findings and Conclusions" submitted by Respondent set forth the issues and the material facts proved by the record.

The sole issue presented in this matter is whether soliciting and obtaining exclusive theatre screening agreements by motion picture advertising distributors constitute an unfair method of competition in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act, and, as such, whether the prevention of such method is in the interest of the public in that it (a) unduly restrains competition; or (b) has created or tends to create in Respondent a monopoly.

There is no charge in the Complaint of any combination or conspiracy. The only charge is that Respondent has individually been guilty of an unfair method of competition.

56 In Federal Trade Commission v. Raladam Company, 283 U. S. 643, 646, the Court said:

"By the plain words of the Act, the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites: (1) that the methods complained of are unfair; (2) that they are methods of competition in commerce; and (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public."

Conceding "arguendo" that the solicitation and obtaining of exclusive theatre screening agreements are methods of competition in commerce, we respectfully submit that the Commission has failed to establish that the methods are unfair, or that the prevention thereof would be in the interest of the public.

The facts establish the following conclusions:

1. That Respondent, in common with other film advertising distributors, has, from the very beginning of the industry, solicited and obtained exclusive theatre screening agreements for reasonable periods of time;

2. That the solicitation and acquisition of theatre screening agreements by Respondent have been in open and free competition;

3. That unless the motion picture advertising business is to be outlawed in its essential functions, the acquisition of some ex-

clusive theatre screening agreements is necessary because

57 (a) Advertisers, whether they be local, national, or regional, must be definitely assured of screen space and time for the distribution and exhibition of their advertising films.

(b) Local advertising will disappear unless distributors can furnish syndicated service through the production of library film.

(c) Film advertising distributors cannot afford the large investments necessary to produce library film and for the renewals and upkeep thereof, and for the necessary organizational and promotional setups, unless they are assured of a market for their products through exclusive theatre screening agreements.

(d) Distributors cannot afford to yield to the importunities of theatre owners as respect minimum guaranteed revenue without a compensating assurance of exclusive screening rights.

(e) Non-exclusive theatres whose screens are open to all distributors tend to become chaotic in respect of the film advertising business, since unlimited access to their screen results in too few or too many advertisements at each performance; in the display of competetive advertisements at the same performance, to the disaffection of advertisers, the annoyance of theatre patrons, and the chagrin of theatre owners; and in the general loss of control of the business by the theatre owners, and of the revenue accruing therefrom.

58 4. That the terms of Respondent's theatre screening agreements are not longer than business necessity dictates for the execution of effective advertising programs;

5. That Respondent, acting independently of its competitors, has undertaken to negotiate theatre screening agreements with theatre owners in the ordinary course of business without deception, misrepresentation, or oppression, at fair prices, and in open and free competition;

6. That exclusive theatre screening agreements do not unduly restrain, lessen, suppress, or injure competition;

7. That exclusive theatre screening agreements have not hindered or prevented competition in the selling, leasing, renting and distributing of commercial or advertising films in commerce, and have not resulted in creating in Respondent a monopoly, and have not a dangerous tendency to create in Respondent a monopoly;

8. That the soliciting and obtaining of exclusive theatre screening agreements do not constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act; and

9. That the prevention of the use of exclusive theatre screening agreements is not in the interest of the public.

Since the beginning of the motion picture advertising fil
industry, distributors have sought and obtained exclusi
59 theatre screening agreements as a necessary market for the
product. Without theatre space, the industry cannot exi
The record abundantly establishes the fact that theatre screeni
space for advertising films is limited to from three to s
advertisements per performance.

The division of this screen space is impossible in those theat
which grant exclusive contracts because the theatre owner cann
legally be prevented from choosing the distributor with which
is willing to do business. The deletion of the word "exclusiv
in the contract could not possibly bring about the result soug
by the Complaint. Even without an exclusive contract, t
theatre owner could, from an operating point of view, limit t
use of the screen to one distributor at a time, simply by not a
cepting advertisements from others. No cease and desist ord
would have the effect of forcing theatre owners to divide the ava
able screen time for advertising between various distributors.

In order for the theatre to maintain the proper and necessa
measure of control over the screen, it is necessary that the distri
utor handling film advertising be reliable, both as to the quali
of the film displayed, and financially. The theatre owner is n
willing to display any quality of advertising on his screen. H
needs assurance that the consideration of the contract will
promptly paid.

Many of the theatre owners who testified in this case stated th
they would rather forego the supplemental income derived fro
screen advertising if they were required to do business with mo
than one distributor at the same time.

60 That the theatre owner has the legal right to choose t
distributor with which he will do business needs little cit
tion of authority. In Moore v. New York Cotton Exchange, 2
U. S. 593, 606, the Court said:

"It has long been settled by this Court that under such circu
stances a trader or manufacturer engaged in a purely priva
business may freely exercise his independent discretion in respe
of the persons with whom he will deal and to whom he will s
and refuse to sell."

All distributors alike, from the very beginning of the industr
have sought and obtained exclusive theatre screening agreemen
This method of doing business is not some new scheme adopt
by Respondent to stifle competition. It is abundantly establish
by the record that exclusive theatre screening agreements a
necessary to the operation of the business.

In Federal Trade Commission v. Gratz, 253 U. S. 421, 427, t
Court said:

"The words 'unfair method of competition' are not defined by the statute and their exact meaning is in dispute. It is for the Courts, not for the Commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals * * * or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The Act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

61 The Complaint contains no intimation that Respondent did not properly obtain exclusive theatre screening agreements. So far as appears, acting independently of their competitors, Respondent undertook to negotiate these contracts with theatre owners in the ordinary course of business, without deception, misrepresentation, or oppression, at fair prices, and in open and free competition As stated in Federal Trade Commission v. Gratz, supra, at page 426:

"If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved."

We submit that the solicitation and acquisition of exclusive theatre screening agreements for terms of from one to five years do not constitute an unfair method of competition.

We furthermore submit that the prevention of the use of this method would not be in the interest of the public.

In Federal Trade Commission v. Raladam Company, supra, at page 647, the Court said:

"The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

62 The history of the industry has proved that there has always been, and is now, a fair opportunity between distributors for the solicitation and securing of theatre screening agreements.

It is to the decided interest of the public that the business be conducted in such a way as to be economically practicable. Advertisers cannot possibly use this limited medium without definite assurance of the theatre space and time available. No distributor has ever succeeded without some exclusive theatre screening agreements. We therefore, submit that it is not in the interest of the public to prevent the use of the only method which has been proved to be economically sound and practicable.

The issue in the present case is simply this: Does the practice of soliciting and acquiring exclusive theatre screening agreements

required by the exigencies of motion picture advertising and limited in duration to the necessities of the business, operate as an unreasonable restraint of trade, or tend unduly to build up in Respondent a monopoly?

Since the record negatives any suggestion of a scheme to control prices, or of a calculated design to restrain trade or create a monopoly, the sole issue is whether this practice is unreasonable under the circumstances disclosed by the record. Reasonableness being the issue, it is obvious that the facts which are the background of this practice, and the motivating considerations thereof, are relevant to the proper determination of the question. Each case depends upon its own facts.

Thus, in Sugar Institute v. United States, 297 U. S. 553, 600, Chief Justice Hughes said:

63 "We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree."

And, in Appalachian Coals, Inc. v. United States, 288 U. S. 344, 360, 361, the Chief Justice used the following language:

"The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness. They call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis.

* * * * *

"In applying this test, a close and objective scrutiny of particular conditions and purposes is necessary in each case. Realities must dominate the judgment. The mere fact that the parties to an agreement eliminate competition between themselves, is not enough to condemn it.

* * * * *

64 "It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probabl

consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal."

As Mr. Justice Brandeis said in Board of Trade v. United States, 246 U.S. 231, 238, 239:

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the Court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer allegations concerning the history and purpose of the Call rule and in later excluding evidence
65 on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law."

That exclusive theatre screening agreements are necessary to do business, and that the policy of an open screen available to more than one distributor at the same time, is disadvantageous to the theatre owner, the advertiser, the distributor and the public, are clearly brought out in the record by the cross-examination of the Commission's own witness, W. B. Reichart, who testified:

"A. I would say, for my experience over these years, which are seven or eight, that it is disadvantageous to every one concerned.

"Q. For what?

"A. For a position to exist where a theatre has more than one contract with distributors, * * *

"Q. Do I understand your answer, you stated that your experience in the industry has led you to believe that it would be disadvantageous for all concerned—meaning everybody—the theatre and the distributor?

"A. And the advertiser, because he would be wanting his ad on the screen and he could not get it on there after he had bought it, in fact" (Tr. 244).

If an open screen policy would be disadvantageous to all concerned, how can it possibly be argued that the policy of exclusive theatre screening agreements is unreasonable?

In order to consider this case properly, the nature of the
66 exclusive theatre screening agreement must be analyzed.

A theatre screening agreement is merely a contract of agency under which the film advertising distributor appoints a theatre as its agent to exhibit film advertising for the distributor. Under an exclusive theatre screening agreement the theatre agrees that in consideration of the contract it will not act as an agent for any other distributor in the exhibition of advertising films during the life of the contract.

In practically all businesses manufacturers and merchants have the legal right to appoint agents to represent them, subject to the condition that the agent will not distribute the products of others. Just such an issue was presented in Federal Trade Commission v. Curtis Publishing Co., 250 U. S. 568, where the Commission sought to obtain a cease and desist order against Curtis Publishing Co. to prevent its entering into contracts with news dealers whereunder the dealers were appointed exclusive agents to distribute the weekly and monthly periodicals of Curtis Publishing Co., subject to the condition that the dealers would act exclusively for Curtis Publishing Co., and would not distribute the periodicals of any competitor. In holding that an exclusive agency agreement was lawful, and that the cease and desist order should be set aside, the Supreme Court of the United States said at pages 581 and 582:

"The engagement of competent agents obligated to devote their time and attention to developing the principal's business, to the exclusion of all others, where nothing else appears, has long been recognized as proper and unobjectionable practice. The evi-
dence clearly shows that respondent's agency contracts were
67 made without unlawful motive and in the orderly course of an expanding business. It does not necessarily follow because many agents had been general distributors, that their appointment and limitation amounted to unfair trade practice. And such practice cannot reasonably be inferred from the other disclosed circumstances. Having regard to the undisputed facts, the reasons advanced to vindicate the general plan are sufficient.

"Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute."

That case presents an exact parallel to the case at bar. There, Curtis Publishing Company entered into agreements with news

dealers whereunder the dealers were appointed as exclusive agents to distribute the periodicals of their principal, subject to the condition that the agents would not, during the life of the contract, distribute the periodicals of competitors. Here, Respondent enters into agreements with theatres whereunder the theatres are appointed as exclusive agents of Respondent to distribute the advertising films of their principal, subject to the condition that the agents will not, during the life of the contract, distribute the advertising films of competitors.

68 We submit that the principle announced in the Curtis case is fully applicable here, and that the mere selection of competent, successful and exclusive representatives in the orderly course of business, where the agency contracts are made without unlawful motive, does not constitute an unfair method of competition, and affords no ground for condemnation under the statute.

For the foregoing reasons, we respectfully submit that the Complaint should be dismissed.

Respectfully submitted.

LOUIS L. ROSEN,
Attorney for Respondent, Motion Picture Advertising Service Company, Inc.

70 Before Federal Trade Commission

Order closing proceedings

Received April 28, 1949

[Title omitted.]

The Trial Examiner having issued his order dated January 17, 1949, allowing the parties fifteen (15) days within which to file motions for reconsideration in reversal of rulings as provided by Rule XX and thirty (30) days within which to file proposed findings and conclusions as provided by Rule XXI, and

It appearing that no motions for reconsideration and reversal of rulings were filed by either party, and

It further appearing that the time within which the parties were to file proposed findings and conclusions was on February 2, 1949, extended to and including March 15, 1949, and

It further appearing that proposed findings and conclusions have now been filed by the attorneys for the respondent,

71 It is Hereby Ordered that the proceedings herein be and the same are hereby closed.

Earl J. Kolb,
(EARL J. KOLB),
Trial Examiner.

WASHINGTON, D. C., *April 26, 1949.*

Copies to Floyd O. Collins, Esq., Attorney, Federal Trade Commission. Louis L. Rosen, Esq., Rosen, Kammer, Wolff, Hopkins & Burke, Hibernia Bank Building, New Orleans 12, Louisiana.

72 Before Federal Trade Commission

Docket No. 5498

IN THE MATTER OF MOTION PICTURE ADVERTISING SERVICE COMPANY, INC., A CORPORATION

Trial examiner's recommended decision

Received May 31, 1949

Before: Earl J. Kolb, Trial Examiner. Appearances: Floyd O. Collins and Lewis F. Depro, Attorneys in support of the complaint; Louis L. Rosen of Rosen, Kammer, Wolff, Hopkins & Burke, Attorney in opposition to the complaint.

I. Proceedings

This is a proceeding under Section 5 of the Federal Trade Commission Act wherein the Commission issued its complaint on the 26th day of May 1947 against Motion Picture Advertising Service Company, Inc., a corporation, which in substance charged the respondent with engaging in unfair methods of competition in commerce by entering into long term exclusive screening agreements with various motion picture exhibitors the capacity, tendency and effect of which was to unduly restrain and restrict competition in violation of the provisions of Section 5 of said Act.

Answer was filed June 16, 1947.

73 On August 4, 1947, Frank Hier was appointed Trial Examiner by the Commission, and thereafter on September 9, 1947, said Trial Examiner held a hearing in this proceeding at which a partial stipulation of facts was entered into upon the record and certain exhibits received in evidence pursuant to said stipulation. Subsequent thereto on March 9, 1948, Earl J. Kolb, the undersigned, was duly designated and appointed by the Commission as Trial Examiner in this proceeding to take testimony and receive evidence herein and to perform all other duties authorized by law, in the place and stead of Trial Examiner Frank Hier.

At the initial hearing held before Trial Examiner Earl J. Kolb at Chicago, Illinois, on April 12, 1948, the parties by stipulation waived any objections which they might have to the substitution of Earl J. Kolb as Trial Examiner in the place of Frank Hier in this

proceeding and the parties further stipulated that the stipulation heretofore entered upon the record and the exhibits admitted in evidence pursuant thereto be considered as though said stipulation had been entered into before and the exhibits received by the undersigned as presiding Trial Examiner.

Thereafter hearings were held before the undersigned as Trial Examiner at which testimony and other evidence were introduced in support of, and in opposition to, the allegations of said complaint.

Transcript of testimony and exhibits were duly filed in the office of the Commission at Washington, D. C., and the Trial Examiner issued his order dated January 17, 1949, closing
74 reception of testimony. Subsequent thereto Suggested Findings and Conclusions were filed by counsel in support of the complaint, and by counsel for the respondent on March 15, 1949, and March 14, 1949 respectively. This case was closed before the Trial Examiner on April 26, 1949 and the Trial Examiner now submits his recommended decision herein.

II. Pleadings

The complaint

The complaint charges that the respondent, Motion Picture Advertising Service Company, Inc., a corporation, in connection with the sale, lease, rental and distribution in interstate commerce of commercial or advertising films has entered into long term screening agreements with various motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films on the screens of the theatres owned or controlled by such exhibitors.

The complaint further charges that the acts and practices of the respondent in entering into, adhering to and enforcing screening agreements with exhibitors for the exclusive privilege of exhibiting commercial and advertising films, produced and distributed by it, on the screens of the theatres owned or controlled by such exhibitors, have the capacity, tendency and effect of unduly restraining and restricting competition in the interstate sale, lease, rental and distribution of commercial advertising films and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

75 The complaint further charges that as further effect of the above-described agreements, advertisers or prospective advertisers, who, in their respective marketing areas, have sought to obtain motion picture film advertising through other film dis-

tributors have been compelled as a result of the restrictive provisions of said agreements either to place their business with the respondent or to forego this type of advertising.

The answer

Respondents in their answer admit the use of the exclusive screening agreements as alleged in the complaint but deny that the use of such exclusive screening agreements has the capacity, tendency or effect of restraining trade or monopolizing business within the intent and meaning of the Federal Trade Commission Act.

In addition the answer alleges as affirmative defenses that the Federal Trade Commission does not have jurisdiction of these proceedings because the issues involved were finally adjudicated by the Federal Trade Commission in its former proceedings against respondent in Docket No. 4736 entitled "In the Matter of Screen Broadcast Corporation, a corporation, et al."

The issues

1. Do respondent's screening agreements, by which exhibitors agree not to screen or display any advertising films other than those furnished by the respondent, restrain competition to
76 the extent that public interest requires corrective action under Section 5 of the Federal Trade Commission Act?

2. Were the issues involved in this proceeding finally adjudicated by the Commission in its former proceeding against respondent in Docket No. 4736?

III. Report Upon the Evidence

Issue 1. Do respondent's screening agreements, by which exhibitors agree not to screen or display any advertising films other than those furnished by the respondent, restrain competition to the extent that public interest requires corrective action under Section 5 of the Federal Trade Commission Act?

1. The respondent Motion Picture Advertising Service Company, Inc., is a corporation organized under the laws of the State of Louisiana with its principal office and place of business located at 1032 Carondelet Street, New Orleans, Louisiana.

2. Since 1925 respondent has been engaged in the production and distribution of motion picture advertising films which it produces and causes to be exhibited upon the screens of motion picture theatres throughout the various states of the United States. In connection with the distribution of such motion picture film advertising, the respondent enters into contracts for the display of such advertising with advertisers and also enters into theatre

screening agreements with theatre owners, both independent and chain, who are hereinafter referred to as exhibitors.

77 3. In the performance of its contracts with various advertisers to display advertising films in various theatres, the respondent ships such advertising films from its place of business in the State of Louisiana to various exhibitors located in other states of the United States, which advertising films are reshipped to the respondent after screening has been completed by the exhibitor. In the case of the manufacturer-dealer or cooperative film advertising the respondent also ships its advertising films to other distributors for screening in theatres controlled by such distributors in the various states of the United States.

4. In the course and conduct of its business, the respondent has been engaged in substantial competition with other corporations, individuals and business concerns in the sale, lease and distribution of commercial or advertising films in interstate commerce. There are in the United States at least 28 producers and distributors of 35 mm. film advertising playlets.

5. The advertising film busines as conducted by the respondent falls into three divisions: local advertising, manufacturer-dealer or cooperative advertising, and national advertising (Tr. 439–60).

6. These motion picture advertising films used by the respondent are of the playlet type, about 40 feet in length, with a 20 foot trailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon animation with sound accompaniment (Tr. 403, 514).

7. In local advertising the expense of producing a special
78 film for the advertiser would be prohibitive. In order to make such advertising available to local advertisers the so-called library film has been developed by the respondent and other advertising film producers and distributors. These library films consist of a series of playlets, advertising various lines of business (Tr. 400–03). Respondent carries playlets in its library sufficient to advertise about forty lines of business with a different playlet each week (Tr. 577). These library films provide the local advertiser with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets (Tr. 399, 435–36).

8. The manufacturer-dealer or cooperative program uses playlets much the same as the library films for local advertising except that under this plan a series of specific playlets are produced advertising the product of the manufacturer. Under this plan the manufacturer usually pays the cost of the production and the prints and the dealer pays all or part of the theatre charge. In

such cases the playlet carries trailer identifying the dealer much the same as in local advertising (Tr. 408–11, 448–54).

9. National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and the cost of production and exhibition are borne exclusively by the manufacturer. This plan is generally used for product advertising, where the manufacturer sells to a large number of dealers on a nonexclusive basis (Tr. 411–13, 456–59).

79 10. The screening agreements, used by the respondent, provide that the exhibitor shall properly display advertising films supplied by the respondent on the screens of the theatres designated, at each and every performance and at a time when the theatre is dark and the audience is seated and that the respondent will pay the exhibitor each month for screening as designated in the contract, and the exhibitor agrees to return all films promptly to the respondent at the end of the screening period (Com. Exs. 21, 22).

11. In the course and conduct of its business, and particularly with reference to its local advertising, the respondent usually requires its salesmen to visit designated towns in their territory at regular and frequent intervals. The salesman first contacts the theatre and determines what screening space is available for film advertising and endeavors to get an agreement in writing from the theatre for the display of respondent's advertising films on the screens of such theatre. When such agreement has been executed, the salesman then proceeds to sell the allotted space on the theatre screen to advertisers (Tr. 439–43).

12. The respondent enters into written contracts with exhibitors for the maximum period of five years with many being written for two year and one year terms. A substantial number of the contracts executed with exhibitors contain the provision that the exhibitor agrees to display only advertising films furnished by the respondent excepting films or slides for charitable or governmental organizations or announcements of attractions of

80 the theatres. An average of about one-third of the theatre screening agreements expires each year (Tr. 335, 572–73; Com. Exs. 21, 22).

13. Contracts for screening with the theatres provide that upon expiration or termination of the agreement all service that has been contracted for during the life of the agreement is to be screened until such service contracts are terminated by performance (Com. Exs. 21, 22).

14. In the case of local advertising several weeks or months may elapse after the screen has become available before sufficient contracts with advertisers can be obtained to fill the screen of the

theatre. In the case of manufacturer-dealer or cooperative advertising, a lapse of several months may occur between the initial solicitation of the advertiser and the production of the playlets, approval by the advertiser and solicitation of dealers (Tr. 828–31, 854–57, 1033, 1115–18).

15. Film advertising contracts with the advertiser should run for at least a year to produce the desired results (Tr. 406–07). A year's advertising contract has thus become standard practice (Tr. 406–07).

16. As of August 1, 1947, there were approximately 20,306 theatres in the United States, and of these about 12,676 exhibited film advertising. Respondent as of that date had screening agreements with 4,096 theatres, of which 2,493 contained the exclusive clause (Com. Ex. 1). Approximately 25 percent of respondent's screening agreements are for a period of five years (Tr. 1122).

81 17. The number of theatres which display screen advertisements is limited, it having been estimated that only about 60 percent of the theatres accept film advertising (Com. Ex. 1). Theatre patrons resent the showing of too much film advertising and thus impose natural limitations on the number of ads that may be run by theatres, the number varying from three to six ads, or an overall of two, three or four minutes or 2 percent to 4 percent of the time consumed by each show (Tr. 570, 648, 652–53, 658–59, 671, 727–31, 789, 843, 952, 1014, 1068, 1089).

18. Several competitors of the respondent who appeared as witnesses testified that the exclusive contracts held by the respondent had prevented their firms from doing business with certain theatres and in certain localities:

a. T. B. Grinspan of the Parrot Distributing Company testified that this company had been engaged in the distribution of advertising films, theatre trailers and industrial films for the past 28 or 29 years. This organization does not make screening agreements with theatres but sells its films outright to advertisers or distributors, who make their own screening agreements with theatres. At one time the company carried a line of library films, but it has discontinued such films because of insufficient outlets for distribution (Tr. 76–88).

b. J. A. Pope testified that he was a distributor of advertising films, purchased from the Parrot Film Company during the period from 1940 to 1945, in the territory of Arkansas, Oklahoma and Southern Missouri, and that a number of theatres

82 discontinued or refused to screen advertising for his customers because of exclusive agreements with the respondent (Tr. 97–228). Witness testified that he quit the film business because he could not book enough theatres to keep him going (Tr. 128). This witness also stated that in 1943 Parrot informed him

that film was getting scarce and that they might have to discontinue and that they could not supply all the advertising film that he wanted and cut down the number of ads they could supply (Tr. 225–26).

c. W. Bill Reichert testified to being unable to continue or to place film advertising on the screens of certain theatre chains and individual theatres because of exclusive agreements between the exhibitors and the respondent. Witness further testified that the respondent did upon request permit his films to be screened in some of the theatres where respondent had screening agreements, on the regular commission arrangement of 15 percent less 2 percent for cash (Tr. 231–65, Res. Ex. 1).

d. Rene P. Karrigan and Robert Weigan, officers of Commerce Pictures Sales, Inc., testified as to discontinuance of advertising and inability to place advertising in certain theatres because of exclusive contract between the exhibitors and the respondent. Witness testified that he had arrangements to screen advertising in some theatres controlled by the respondent on regular agency commission basis of 15 percent and that he had not been able to screen advertising in such theatres until after making the agency arrangement with respondent (Tr. 295–334).

83 e. Noble C. Campbell testified that he was a distributor of Parrot Films in Kentucky, West Virginia, Virginia, North Carolina, and South Carolina and that he had been unable to do business with certain exhibitors because of exclusive contracts with respondent (Tr. 340–60; Com. Ex. 27D).

19. In presenting their case the respondent offered testimony and other evidence to show that the advertising films sold or distributed by certain of its competitors were inferior and less acceptable to theatres than the advertising films of the respondent and for this and other reasons these competitors had been excluded from the screens of certain theatres and not because of the existence of exclusive agreements:

a. John S. Dougherty testified that he used Parrot Films but they were old and out of date, due principally to war conditions, and were 20 feet in length rather than the usual 60 feet. Advertisers complained that these films were not satisfactory for their business and theatres considered the films unsatisfactory (Tr. 680–700).

b. Arthur E. Fox while with Dougherty about 1943 or 1944 used Parrot Films which were old and out of date in addition to being short. Caused a lot of complaints and loss of customers. (Tr. 701–16).

c. W. R. Arndt handled S. & M. ads but arrangement was unsatisfactory as he received films for only one week (Tr. 753–73).

d. J. I. Christian worked with William A. Reichert, Theatre Publicity Service, for two years and with Ross for about nine months. Both used reader type of film with wording superimposed. Advertisers preferred playlet type. Went into business for himself and used same type of film which he had used when with Reichert (Tr. 968–89).

e. Ernest H. Forsythe, theatre owner, Houston, Texas, had contract with William A. Reichert, Theatre Publicity Service, which he canceled for failure to make payments in spring of 1948 (Tr. 1043–49). This was after Reichert had gone out of business (Tr. 234).

20. Respondent makes screen space available to competitors if films are of standard length and of the quality distributed by respondent, if acceptable to the theatre, and if space is available, at trade rates less a discount. In such cases competitor would pay same rate respondent charges its advertising customers less commission of 15 percent, out of which the competitor would have to pay for the film (Tr. 562, 605).

21. In some instances when unable to sell sufficient space on the theatre screen the respondent permitted the theatre to accept advertising from its competitors. Such theatres were usually those in small towns where respondent was not able to give the theatre sufficient revenue to require it to live up to the exclusive clause of the agreement. When respondent has sold space about up to the capacity of the screen or the exhibitor is satisfied with the exclusive arrangement respondent requires advertising of competitors to be submitted to it (Tr. 499–502).

22. There is competition among film advertising distributors for the securing of theatre screening agreements and theatres frequently change distributors at the termination of contracts (Tr. 474, 482–86, 537–38, 578–79).

23. It was the contention of the respondent that because of the beneficial value of exclusive screening agreements to both the distributor and the exhibitor or theatre owner that there is no public interest involved in this proceeding. In support of this contention the respondent offered the testimony of various distributors, including both competitors and members of its own sales organization, who testified as to the benefits to distributors from the use of exclusive screening agreements as follows:

(a) That the maintenance of a satisfactory and up-to-date film library requires a nucleus of exclusive screening agreements with theatres in order to sell the library film service to local advertisers (Tr. 427, 481–82, 515–16, 549–50, 606–07, 685, 779–80, 799–80, 933–34).

(b) That exclusively screening agreements are beneficial to the distributor in enabling him to sell manufacturer-dealer or co-

operative programs (Tr. 515–16, 549–50, 606–07, 799–80, 803–05, 837–42, 1100–03).

(c) That exclusive screening agreements are also beneficial to the distributor in enabling him to maintain a satisfactory
86 sales force as salesmen will not work a territory unless assured by exclusive screening agreements that theatre space will be available (Tr. 549).

(d) That the respondent cannot deal with the theatre on a partial or minimum guarantee basis unless protected by an exclusive screening agreement (Tr. 445–46, 475).

24. In addition respondent offered the testimony of various distributors and exhibitors who testified as to the benefits to the exhibitor or theatre of exclusive screening agreements and the reasons why they prefer such exclusive screening agreements as follows:

(a) That such contracts afford better control of theatre screens (Tr. 645–46, 650, 660–68, 721–22, 746, 765–66, 792–93, 844–45, 892–93, 960–61).

(b) That exclusive screening agreements prevent misunderstandings with local advertisers (Tr. 650, 668–69, 670–72, 721–22, 746–47, 844–45).

(c) That exclusive screening agreements permit theatre to realize the maximum income from screen rentals (Tr. 650, 670–72, 721–22, 725–26, 746, 959).

(d) That exclusive screening agreements by confining dealings to one distributor eliminate complicated bookkeeping procedure (Tr. 844, 848, 892–93, 1069).

(e) That exclusive screening agreements limit film, ad
87 patronage to reliable distributors who will give efficient service and promptly pay bills (Tr. 738–39, 746–47, 765–66, 1014, 1031, 1088–89).

(f) That exclusive screening agreements enable the exhibitor or theatre to control the quality of advertising film on their screens (Tr. 721–22, 765–66, 893, 915–16, 1014, 1088–89).

(g) That exclusive screening agreements enable the exhibitor or theatre to insist upon minimum guarantee (Tr. 576, 600, 721–22, 1089).

Issue 2. Res judicata

1. The defense of res judicata raised by the respondent, based upon a previous proceeding before the Federal Trade Commission in Docket No. 4736, entitled Screen Broadcast Corporation, et al., is not applicable to this proceeding because the issues involved are not the same. Furthermore, this defense was raised in this proceeding by a motion to dismiss, which was denied by

the Commission by its order of February 20, 1948, and is an adjudication of this issue which is binding upon the Trial Examiner.

IV. Conclusions

The shipment of commercial or advertising films from the respondent's place of business in the State of Louisiana to exhibitors, theatres and distributors located in other states of the United States, for screening and to be reshipped to the respondent, constitutes a constant flow of such commercial or advertising films in interstate commerce such as to give the Commission jurisdiction in this proceeding.

88 The use of an exclusive screening agreement is of material assistance in permitting the respondent to hold for its own use the screens of the theatres with whom such contracts were made. By such agreements the respondent is enabled to control the entire screening space for advertising in a theatre by the purchase or guarantee as to only a portion of the available screening space. While witnesses have testified that exclusive screening agreements are necessary to the maintenance of a film library and an efficient sales organization, this is not controlling.

The use of exclusive screening agreements are of material assistance to the theatre in controlling the advertising to be placed on the screen, in eliminating bookkeeping expense and in giving the theatre a bargaining element to obtain more money or higher guarantees for their screening space.

Public interest in this proceeding involves the maintenance of free and open competition. The fact that the agreements in question may be beneficial or instrumental to the respondent in building up its business, or that they may be preferred by theatres, is not material where the effect of such agreements is to restrain and restrict competition.

The restraint upon competition caused by the use of the exclusive clause in screening contracts with theatres is not removed by making space available to competitors in theatres where respondent has exclusive contracts. The conditions under which said space is made available are that films must be of standard length, of the quality distributed by the respondent, satisfactory to

89 the theatre, and space must be available. The terms under which advertising of a competitor will be screened require the payment to respondent of the same rate respondent charges its advertising customers less 15 percent commission. Out of this commission the competitor must pay the costs of the film, overhead and sales expense which would so limit his profit as to make such arrangement unprofitable in local advertising.

The Trial Examiner has given consideration to the effects of exclusive screening agreements upon competition and the extent to which they should be restricted or prohibited, and is of the opinion that under the charges of the complaint it is necessary to consider the exclusive agreement in connection with the contracts with advertisers to determine its effect.

The complaint in this proceeding does not attack the exclusive clause as such but only when used in a long term screening agreement. The charges of the complaint as set out in Paragraph Four thereof read in part as follows:

"In or about the year 1937, and from time to time thereafter, said respondent has entered into long term screening agreements with various motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films, produced or distributed by it, on the screens of the theatres owned or controlled by said exhibitors, and said respondent pays the exhibitor at a stipulated rate for the privilege of displaying its advertising films."

While the use of long term screening agreements was denied in the answer of the respondent, no evidence was introduced in support of the complaint as to what might constitute a long
90 term agreement and consideration must be limited to the evidence introduced by the respondent in justification of the length of their contracts with exhibitors.

The evidence in this proceeding definitely establishes that an advertising contract for a period of one year has become standard practice. In some local advertising the term may be less than a year, but in no case has such contract extended beyond a year except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theatre to determine the space available for screen advertising and enters into a contract for such space. In this way he can then approach the advertiser in a position to show him where space for film advertising is available. In contracting with the theatre it is necessary for the respondent to estimate the amount of space it will be able to sell to advertisers. Since the film advertising space in theatres is limited to four, five or six ads it is not unreasonable for the respondent to contract for all the space available. This is particularly true in the regular territory when the salesman works the locality at regular and frequent intervals.

It accordingly must be concluded that an exclusive screening agreement for a period of one year is not an undue restraint upon competition. The purpose of the Federal Trade Commission Act is not to equalize opportunity but only to maintain free and open competition.[1] In reaching this conclusion the Trial Examiner

[1] Federal Trade Commission vs. Paramount Famous-Lasky Corp., 57 F. (2d) 152, 157.

rejects the contention of the respondent that due to delays
91 in starting advertising contracts after screening agreements are executed, a contract for three years or longer than one year is necessary to the performance of its contracts with advertisers. This contention is rejected because by usual custom and by the terms of respondent's contract the theatre completes the screening of advertisements as required by contract between distributor and advertiser even though the expiration date of such contract extends beyond the expiration of the screening agreement between distributor and theatre.

It is further concluded that public interest requires that the use of exclusive screening agreements which extend for terms greater than one year, be prohibited as constituting an unreasonable restraint and restriction of competition in violation of the Federal Trade Commission Act.

V. Proposed Findings

A. Proposed Findings submitted by attorney in support of the complaint.

1. The Trial Examiner has adopted in substance the findings proposed in Paragraphs 2 to 15 of the proposed findings and conclusion filed by the attorney in support of the complaint.

2. The Trial Examiner has disregarded Paragraph 1 of the said proposed findings as not material to the issues.

3. The Trial Examiner has rejected the proposed conclusion of the attorney in support of the complaint for the reasons set out in Section IV hereof entitled Conclusions.

92 B. Proposed Findings submitted by the attorney for the respondent.

1. The Trial Examiner has adopted in substance the findings proposed in Paragraphs 1–5, 7–14, 16–32, 34–35, 37, 39 of the proposed findings and conclusions filed by the attorney for the respondent.

2. The Trial Examiner has disregarded Paragraphs 6, 15, 33, 36, 38, 40 of said proposed findings as not material to the issues.

3. The Trial Examiner has rejected proposed conclusions 1 to 12 filed by the attorney for the respondent for the reasons set out in Section IV hereof entitled Conclusions.

VI. Recommended Findings as to the Facts

Paragraph One. Respondent Motion Picture Advertising Service Company, Inc., is a corporation organized and existing under the laws of the State of Louisiana with its principal office and

place of business located at 1032 Carondelet Street, New Orleans in the State of Louisiana.

Paragraph Two. Since 1925 the respondent has been engaged in the business of producing, selling, leasing and distributing commercial or advertising films to or for advertisers and to other distributors of advertising films.

In the course and conduct of its business the respondent enters into agreements with various advertisers to display, in
93 designated theatres, motion picture films advertising the business of the advertiser or the commodities sold by him. In connection with such contracts with advertisers the respondent purchases screening space from various exhibitors or theatre owners both independent and chain, who are hereinafter referred to as exhibitors, by entering into agreements with them to display advertising films supplied by the respondent in their various theatres and to return all films promptly to the respondent at the end of the screening period.

In performance of its contracts with advertisers to display motion picture films advertising their businesses or commodities on the screens of various motion picture theatres, respondent ships such advertising films from its place of business in the State of Louisiana to the various theatres and exhibitors located in other states of the United States.

In most instances where agreements to display respondent's advertising films are entered into with other distributors such advertising films are shipped from respondent's place of business in the State of Louisiana, either directly to such distributor or to the theatres designated by them, located in states other than the State of Louisiana. When the screening of such films is completed they are returned to the respondent at its place of business in the State of Louisiana by such exhibitor or distributor.

Respondent maintains and at all times mentioned herein has maintained a course of trade in said commercial or advertising films in commerce among and between the various states of the United States.

94 Paragraph Three. In the course and conduct of its business as herein described, the respondent has been engaged in substantial competition with other corporations, individuals and business concerns, in the sale, lease, and distribution of commercial or advertising films in commerce among and between the various states of the United States.

Paragraph Four. The motion picture advertising film business conducted by the respondent falls into three divisions: local advertising, manufacturer-dealer or cooperative advertising, and national advertising.

The motion picture advertising films used by the respondent are of the playlet type and are about 40 feet in length with a 20 foot trailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon animation with sound accompaniment.

As the price of producing a special series of films for a local advertiser would be prohibitive, the so-called library film has been developed which is adaptable to various lines of business. In this manner the local advertiser is provided with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets.

In the manufacturer-dealer or cooperative program specific playlets are produced advertising the product of the manufacturer.

The cost of production of the playlets is usually paid by
95 the manufacturer, while the dealer pays all or part of the theatre charge. This plan is much the same as the use of library film for local advertising, and is used when a manufacturer has exclusive dealers or a limited number of dealers in various localities. Such dealers are identified by trailers attached to the playlets.

National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and the costs of production and exhibition are borne exclusively by the manufacturer. This plan is generally used for product advertising when the manufacturer sells to a large number of dealers on a nonexclusive basis.

Paragraph Five. In the conduct of its business the respondent enters into written screening agreements with exhibitors and theatres for the maximum period of five years with the majority being written for two year and one year terms. It was estimated that about 25 percent of respondent's screening agreements were for a period of five years. These agreements provide that the exhibitor shall properly display advertising films supplied by the respondent on the screens of their theatres as designated, and return such films to the respondent at the end of the screening period and that the respondent will pay the exhibitor each month for screening as designated in the contract.

Paragraph Six. In connection with the sale or distribution of respondent's screen advertising service, the respondent enters into contracts with advertisers, usually for a period of one year, for

the display of commercial films, advertising their businesses
96 or commodities, which contracts provide for the display of such advertising films in designated theatres weekly or

every other week for a period of usually one year. The shortest term contract which the respondent will accept from an advertiser is thirteen weeks, but this is very rare, and contracts for one year have become the standard practice. The films are changed so that there is a different playlet for each week that a film is shown.

Paragraph Seven. The usual practice, particularly in local advertising, is to make an arrangement with the theatre first, so that the salesman may know what space he has available for advertising and where located. In the greater majority of instances, the beginning of performance of the contract with the advertiser will not coincide with the beginning of the screening agreement with the theatre. This may be due to unexpired contracts of a previous distributor which are still in force or to necessary delays in negotiating contracts with advertisers. This very often results in distributors having unexpired contracts with advertisers when their contract with the theatre expires.

It is the customary procedure in such cases for the theatre to recognize the distributor's contract with the advertiser and permit performance after the expiration date of screening agreement.

In practice, the period of time specified in the contracts between the theatre and distributor means a period of time in which the distributor is at liberty to solicit contracts with advertisers
98 instead of a period of time in which such advertisements will be shown on the screen.

Paragraph Eight. A substantial number of the contracts executed with exhibitors contain the provision that the exhibitor agrees that it will screen or display only advertising films furnished by the respondent, excepting films or slides for charitable or governmental organizations or announcements of attractions of the theatres.

Paragraph Nine. As of August 1, 1947, there were approximately 20,306 theatres in the United States and of these about 12,676 exhibited film advertising. The respondent as of that date had screening agreements with 4,096 theatres of which 2,493 contained the exclusive clause that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent.

Paragraph Ten. The available space for screening advertisements is limited and only approximately 60 percent of the theatres accept film advertising. In addition theatre patrons resent the showing of too much film advertising and thus impose natural limitations on the number of advertisements which may be run by theatres, the number varying from three to six advertisements or an overall of two to four minutes or two to four percent of the time consumed by each show.

Paragraph Eleven. The use by the respondent of the exclusive screening agreements, hereinbefore described, has been of material assistance in permitting the respondent to hold for its own
98 use the screens of the theatres with whom such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theatres thereby limiting the outlets for their films in a more or less limited field and in some instances resulting in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising.

Paragraph Twelve. In the course of this proceeding the respondent has advanced the following contentions in support of its position that no public interest is involved in this proceeding: (1) that respondent does in fact make screen space available to competitors, in theatres with which it has exclusive agreements if such competitors' films are of standard length, of the quality distributed by the respondent, satisfactory to the theatre and screening space is available, and (2) that because of the beneficial value of exclusive agreements to the distributor and theatre, public interest is not involved.

In making screening space available to competitors the respondent requires the payment to it of the same rate respondent charges its advertising customers, less 15 percent commission. Out of this commission, the competitor must pay the costs of the film, overhead and sales expense which so limits his profit as to make such arrangement unprofitable in local advertising.

The beneficial value of exclusive screening agreements to the respondent is that they are instrumental in building up the film advertising business. Such contracts are of assistance in
99 negotiating more satisfactory contracts with both theatres and advertisers. Theatres in many instances prefer such exclusive agreements because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping and prevent misunderstandings with local advertisers. The advertiser, by means of such exclusive agreements, can readily be assured of exclusive use of the screen during the term of his contract.

Conclusion

The Commission has been given careful consideration to the contentions raised by the respondent. The complaint in this proceeding charges the respondent with the use of long term screening agreements which contain the provision that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent. The respondent admits the use of the exclusive clause in its screening agreements, but

denies that its screening agreements were for any longer period of time than was necessary to service its contracts with advertisers. It is further contended by the respondent that because of the beneficial effect of the exclusive clause to the distributor, exhibitor and advertiser, there is no unlawful restraint of competition and no public interest involved in this proceeding.

Public interest in this proceeding involves the maintenance of free and open competition. The fact that the agreements, in question, may be beneficial or instrumental to the respondent in building up its business, or that they may be preferred by theatres, is not material where the effect of such agreements is to restrict and restrain competition.

100 In considering the effect upon competition of the use of respondent's screening agreements in the light of the charges of the complaint, the Commission is of the opinion that the legality of the agreements of the respondent, so far as restraint of competition is concerned, is dependent upon the relationship between the term of respondent's screening agreements with theatres and the term of its contracts with the advertiser.

The evidence in this proceeding definitely establishes that an advertising contract for a period of one year has become a standard practice in the trade. In some local advertising the term may be less than a year, but in no case has such contract extended beyond a year except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theatre to determine space available for screen advertising and then enters into a contract for such space. In this way he can then approach the advertiser and is in a position to show him where space for film advertising is available. In contacting the theatre it is necessary for the respondent to estimate the amount of space it will be able to sell the advertisers. Since film advertising space in theatres is limited to 4, 5, or 6 ads, it is not unreasonable for respondent to contract for all space available. This is particularly true in its regular territory when the salesman works the locality at regular and frequent intervals.

101 It is therefore the conclusion of the Commission that an exclusive screening agreement for a period of one year is not an undue restraint upon competition. In reaching this conclusion the Commission rejects the contention of the respondent that, due to delays in starting advertising contracts after screening agreements were executed, a contract for three years or for a period longer than one year is necessary to the performance of its contracts with advertisers. This contention is rejected because by the usual custom and by the terms of respondent's contracts, the theatre completes the screening of advertisements

as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theatre.

It is further concluded that public interest requires that the use of exclusive screening agreements which extend for terms greater than one year, should be prohibited as constituting an unreasonable restraint and restriction of competition in violation of Section 5 of the Federal Trade Commission Act.

VII. Recommended Order to Cease and Desist

It Is Ordered that the respondent Motion Picture Advertising Service Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale, lease or distribution of commercial or advertising films in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from

102 1. Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theatres owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year.

It Is Furthered Ordered that the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

Respectfully submitted.

Earl J. Kolb,
(Earl J. Kolb),
Trial Examiner.

May 31, 1949.

Note re request and order

Request of counsel supporting the Complaint for Extension of Time to File Exceptions to Trial Examiner's Report and Order approving same thereon;

Order by the Commission Extending time for filing Exceptions to Trial Examiner's Report;

Omitted from the Printed Record, Pursuant to Petitioner's Designation as to Printing Record, copied at Page 1.

103 Before Federal Trade Commission

Stipulation

Received January 16, 1949

[Title omitted.]

Counsel for respondent and counsel in support of the complaint hereby stipulate and agree to waive, and by the terms of this stipulation respectively do waive, the filing of exceptions to the Trial Examiner's report upon the evidence, conclusions, recommended findings as to the facts and conclusions, and recommended order, filed herein May 31, 1949, and other intervening procedure including the filing of briefs and the presentation of oral argument before the Commission.

Dated at Washington, D. C., this 15th day of June 1949.

Louis L. Rosen,
(LOUIS L. ROSEN),
Counsel for Respondent Motion Picture Advertising Service Company, Inc.

Floyd O. Collins,
(FLOYD O. COLLINS,)
Counsel Supporting the Complaint.

104 Before Federal Trade Commission

Findings as to the facts and conclusion

October 17, 1950

Commissioners: James M. Mead, Chairman, William A. Ayres, Lowell B. Mason, John Carson.

[Title omitted.]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 26, 1947, issued and subsequently served its complaint in this proceeding upon the respondent named in the caption hereof, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said Act. After the respondent filed its answer; testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a trial examiner of the Commission theretofore duly designated by it and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answer thereto, testimony and

other evidence, and the recommended decision of the trial
105 examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument having been waived); and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

Findings as to the Facts

Paragraph One. Respondent Motion Picture Advertising Service Company, Inc., is a corporation organized and existing under the laws of the State of Louisiana, with its principal office and place of business located at 1032 Carondelet Street, New Orleans, in the State of Louisiana.

Paragraph Two. Since 1925 the respondent has been engaged in the business of producing, selling, leasing and distributing commercial or advertising films to or for advertisers and to other distributors of advertising films.

In the course and conduct of its business the respondent enters into agreements with various advertisers to display, in designated theaters, motion picture films advertising the business of the advertiser or the commodities sold by him. In connection with such contracts with advertisers the respondent purchases screening space from various exhibitors or theater owners, both independent and chain, who are hereinafter referred to as exhibitors, by entering into agreements with them to display advertising films supplied by the respondent in their various theaters and to return all films promptly to the respondent at the end of the screening period.

106 In performance of its contracts with advertisers to display motion picture films advertising their businesses or commodities on the screens of various motion picture theaters, respondent ships such advertising films from its place of business in the State of Louisiana to the various theaters and exhibitors located in other states of the United States.

In most instances where agreements to display respondent's advertising films are entered into with other distributors such advertising films are shipped from respondent's place of business in the State of Louisiana, either directly to such distributor or to the theaters designated by them, located in states other than the State of Louisiana. When the screening of such films is completed they are returned to the respondent at its place of business in the State of Louisiana by such exhibitor or distributor.

Respondent maintains and at all times mentioned herein has maintained a course of trade in said commercial or advertising films in commerce among and between the various states of the United States.

Paragraph Three. In the course and conduct of its business as herein described, the respondent has been engaged in substantial competition with other corporations, individuals and business concerns, in the sale, leasing and distribution of commercial or advertising films in commerce among and between the various states of the United States.

Paragraph Four. The motion picture advertising film business conducted by the respondent falls into three divisions: local
107 advertising, manufacturer-dealer or cooperative advertising, and national advertising.

The motion picture advertising films used by the respondent are of the playlet type and are about 40 feet in length with a 20-foot trailer attached identifying the advertiser. These films may be either black and white or color, with live action or cartoon animation with sound accompaniment.

As the price of producing a special series of films for a local advertiser would be prohibitive, the so-called library film has been developed which is adaptable to various lines of business. In this manner the local advertiser is provided with ready-made motion pictures for the advertising of his particular business which are personalized by the addition of a name trailer which identifies the advertiser with the line of business advertised by the playlets.

In the manufacturer-dealer or cooperative program specific playlets are produced advertising the product of the manufacturer. The cost of production of the playlets is usually paid by the manufacturer, while the dealer pays all or part of the theatre charge. This plan is much the same as the use of library film for local advertising, and is used when a manufacturers has exclusive dealers or a limited number of dealers in various localities. Such dealers are identified by trailers attached to the playlets.

National advertising is national or regional in scope and consists of playlets produced to the manufacturer's specifications and the costs of production and exhibition are born exclusively
108 by the manufacturer. This plan is generally used for product advertising when the manufacturer sells to a large number of dealers on a nonexclusive basis.

Paragraph Five. In the conduct of its business the respondent enters into written screening agreements with exhibitors and theaters for a maximum period of five years with the majority being written for two year and one year terms. It was estimated that about 25 percent of respondent's screening agreements were

for a period of five years. These agreements provide that the exhibitor shall properly display advertising films supplied by the respondent on the screens of their theaters as designated, return such films to the respondent at the end of the screening period, and that the respondent will pay the exhibitor each month for screening as designated in the contract.

Paragraph Six. In connection with the sale or distribution of respondent's screen advertising service, the respondent enters into contracts with advertisers usually for a period of one year, for the display of commercial films, advertising their businesses or commodities, which contracts provide for the display of such advertising films in designated theaters weekly or every other week for a period of usually one year. The shortest term contract which the respondent will accept from an advertiser is thirteen weeks, but this is very rare, and contracts for one year have become the standard practice. The films are changed so that there is a different playlet for each week that a film is shown.

109 Paragraph Seven. The usual practice, particularly in local advertising, is to make an arrangement with the theater first, so that the salesman may know what space he has available for advertising and where located. In the greater majority of instances, the beginning of performance of the contract with the advertiser will not coincide with the beginning of the screening agreement with the theater. This may be due to unexpired contracts of a previous distributor which are still in force or to necessary delays in negotiating contracts with advertisers. This very often results in distributors having unexpired contracts with advertisers when their contract with the theater expires.

It is the customary procedure in such cases for the theater to recognize the distributor's contract with the advertiser and permit performance after the expiration date of screening agreement.

In practice, the period of time specified in the contracts between the theater and distributor means a period of time in which the distributor is at liberty to solicit contracts with advertisers instead of a period of time in which such advertisements will be shown on the screen.

Paragraph Eight. A substantial number of the contracts executed with exhibitors contain the provision that the exhibitor agrees that it will screen or display only advertising films furnished by the respondent, excepting films or slides for charitable or governmental organizations or announcements of attractions of the theaters.

110 Paragraph Nine. As of August 1, 1947, there were approximately 20,306 theaters in the United States and of these about 12,676 exhibited film advertising. In the District of Columbia and the 27 states where theaters having contracts with

respondent were located, there were approximately 6,260 theaters regularly exhibiting screen advertising for compensation. The respondent as of this period had screening agreements with 4,096 theaters of which 2,493 contained the exclusive clause that the exhibitor will not screen or display any advertising or commercial films other than those furnished by respondent.

Among others engaged in the sale and distribution of advertising films are Reid H. Ray Film Industries, Inc., Alexander Film Company, and United Film Service, Inc., which companies are respondents in Dockets 5495, 5496, and 5497, respectively. As of August 1947 Reid H. Ray Film Industries, Inc., had agreements with exhibitors operating 1,450 theaters and of this number the agreements relating to 458 contained the provision that no local advertising other than commercial film advertising furnished by Reid H. Ray Film Industries, Inc., would be displayed for remuneration during the terms of such agreements. Many of such agreements were for a term of two years. Alexander Film Company had screening agreements containing an exclusive feature on its behalf, some for a maximum term of three years, with 4,913 theaters, and United Film Service, Inc., had similar contracts with 1,562, many for a maximum term of five years. The total number of exclusive arrangements held by the aforesaid three companies and the respondent in this proceeding approximated three-fourths of the total number of theaters in the United States which displayed advertising films for compensation.

111

Paragraph Ten. The available space for screening advertisements is limited and only approximately 60 percent of the theaters accept film advertising. In addition, theater patrons resent the showing of too much film advertising and thus impose natural limitations on the number of advertisements which may be run by theaters, the number varying from three to six advertisements or an over-all of two to four minutes or two to four percent of the time consumed by each show.

Paragraph Eleven. The use by the respondent of the exclusive screening agreements, hereinbefore described, has been of material assistance in permitting the respondent to hold for its own use the screens of the theaters with which such contracts were made and has deprived competitors of the respondent from showing their advertising films in such theaters thereby limiting the outlets for their films in a more or less limited field and in some instances resulted in such competitors being forced to go out of the screen advertising business because of inability to obtain outlets for their screen advertising.

The injurious effects of the respondent's aforesaid agreements upon the competition of others engaged in the interstate sale, leas-

ing, rental and distribution of advertising films, together with the tendency to monopoly which is inherent therein, have been materially increased by the cumulative effects of similar agree-
112 ments with other exhibitors which have been entered into by Reid H. Ray Film Industries, Inc., Alexander Film Company, and United Film Service, Inc.

Paragraph Twelve. In the course of this proceeding the respondent has advanced the following contentions in support of its position that no public interest is involved in this proceeding: (1) that respondent does in fact make screen space available to competitors in theaters with which it has exclusive agreements if such competitors' films are of standard length, of the quality distributed by the respondent, satisfactory to the theater and screening space is available, and (2) that because of the beneficial value of exclusive agreements to the distributor and theater, public interest is not involved.

In making screening space available to competitors the respondent requires the payment to it of the same rate respondent charges its advertising customers, less 15 percent commission. Out of this commission, the competitor must pay the costs of the film, overhead and sales expense which so limits his profit as to make such arrangement unprofitable in local advertising.

The beneficial value of exclusive screening agreements to the respondent is that they are instrumental in building up the film advertising business. Such contracts are of assistance in negotiating more satisfactory contracts with both theaters and advertisers. Theaters in many instances prefer such exclusive agreements because they give better control of the screen advertising, eliminate uncertainty and extra bookkeeping and prevent misunderstandings with local advertisers. The advertiser, by means of such exclusive agreements, can readily be assured of
113 exclusive use of the screen during the term of his contract.

Conclusion

The Commission has given careful consideration to the contentions raised by the respondent. The complaint in this proceeding charges the respondent with the use of long term screening agreements which contain the provision that the exhibitor will not screen or display any advertising or commercial films other than those furnished by the respondent. The respondent admits the use of the exclusive clause in its screening agreements, but in essence denies that its screening agreements were for any longer period of time than was necessary to service its contracts with advertisers. It is further contended by the respondent that because of the beneficial effect of the exclusive clause to the distrib-

utor, exhibitor, and advertiser there is no unlawful restraint of competition and no public interest involved in this proceeding.

The maintenance of free and open competition is in the public interest and public interest exists in the elimination of practices which have the capacity and effect of unreasonably restraining trade or which tend to monopoly. The fact that the agreements in question may be beneficial or instrumental to respondent in building up its business, or that they may be preferred by theaters, is not controlling where the effects of such agreements have been and are, as in the circumstances here, to unduly hinder, lessen, and injure competition.

In considering the effect upon competition of the use of respondent's screening agreements containing the exclusive
114 provision in the light of the charges of the complaint, the Commission is of the opinion that the reasonableness of the restraints imposed thereunder is dependent upon the relationship between the term of respondent's screening agreements with theaters and the term of its contracts with the advertiser.

The evidence in this proceeding definitely establishes that an advertising contract for a period of one year has become a standard practice in the trade. In some local advertising the term may be less than a year, but in no case has such contract extended beyond a year except in the case of renewal.

Under the general practice the representative of the respondent first contacts the theater to determine if space is available for screen advertising and makes such arrangements as conditions warrant with respect to such space. In this way respondent's representative is able to show prospective advertisers where space is available. In contacting the theater it is necessary for the respondent to estimate the amount of space it will be able to sell to advertisers. Since film advertising space in theaters is limited to four, five or six advertisements, it is not unreasonable for respondent to contract for all space available in such theaters, particularly in territories canvassed by its salesmen at regular and frequent intervals.

It is therefore the conclusion of the Commission in the circumstances here that an exclusive screening agreement for a period of one year is not an undue restraint upon competition.
115 The Commission, however, rejects the contention of the respondent that, due to delays in starting advertising contracts after screening agreements were executed a contract for two years or for a period longer than one year is necessary to the performance of its contracts with advertisers. This contention is rejected because by the usual custom and by the terms of respondent's contracts, the theater completes the screening of ad-

vertisements as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theater.

It is concluded in the circumstances here that the use by respondent of exclusive screening agreements which extend for terms greater than one year constitutes an unreasonable restraint and restriction of competition and that prohibition of respondent's use thereof is required in the public interest.

The aforesaid acts and practices of the respondent as herein found constitute unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

By the Commission, Commissioner Mason dissenting.

[SEAL]

Jas. M. Mead,
(JAS. M. MEAD),
Chairman.

Issued October 17, 1950.

Attest:

W. P. Glendening, Jr.,
(WM. P. GLENDENING, JR.),
Acting Secretary.

116 Before Federal Trade Commission

Order to cease and desist

October 17, 1950

Commissioners: James M. Mead, Chairman, William A. Ayres, Lowell B. Mason, John Carson.

[Title omitted.]

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of the respondent, testimony and other evidence taken before a trial examiner of the Commission theretofore duly designated by it, and the recommended decision of the trial examiner (all other intervening procedure, including the filing of briefs and presentation before the Commission of oral argument having been waived); and the Commission, having made its findings as to the facts and its conclusion that the respondent has violated the provisions of the Federal Trade Commission Act:

It Is Ordered that the respondent, Motion Picture Advertising Service Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate

or other device, in connection with the sale, leasing or dis-
117 tribution of commercial or advertising films in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year, or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.

It Is Further Ordered that the respondent shall, within (60) days after service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission, Commissioner Mason dissenting.

Wm. P. Glendening, Jr.,
(Wm. P. Glendening, Jr.),
Acting Secretary.

Issued October 17, 1950.

"Opinion of the Commission" is attached.

"Dissenting Opinion of Commissioner Lowell B. Mason" is attached.

118 Before Federal Trade Commission

Opinion of the Commission

Docket No. 5495, Docket No. 5496, Docket No. 5497, Docket No. 5498

In the Matter of Ray-Bell Films, Inc., Alexander Film Company, United Film Ad Service, Inc., Motion Picture Advertising Service Company, Inc.

Mead, *Commissioner*:

The Commission issued complaints in the four different cases described in the heading of this opinion, charging that the respective respondents were engaged in unfair practices in violation of Section 5 of the Federal Trade Commission Act. These cases involve similar questions of fact and law. The statements and conclusions in this opinion refer to the cases collectively and individually.

The respondents are the largest producers and distributors of advertising films in the United States. Respondents have entered into contracts with owners of various theatres located

throughout the United States and have obtained the exclusive use of such theater screens for long periods of time. These periods vary in length from one year or less up to five years, during which time the exhibitors agree to display no advertising films for compensation other than those furnished by the respondent with whom the contract is made. Respondents' films may be prepared
119 pursuant to agreements with merchants who are prospective advertisers, but there is a substantial volume of ready made or so-called library film of the playette type distributed by respondents. Such films are personalized by the addition of a name trailer identifying the advertiser with the line of business advertised by a particular playette. The agreements between the respondents and the merchants who are recipients of the advertising expire within a period of one year or less.

The principal question involved in these cases is whether or not the restrictive covenants contained in the various screening agreements between the respondent advertising film companies as distributors and certain theater operators or exhibitors constitute an unreasonable restraint upon commerce and are therefore in violation of Section 5 of the Federal Trade Commission Act.

It appears that the use by the respondents of their exclusive screening agreements has been of material assistance in permitting each of the respondents to hold for his own use the screens of the theaters with which such contracts have been made. Competing distributors have been deprived from showing their advertising film in such theatres thereby limiting the outlets for competitive films in a more or less limited field. In some instances, competitors have been forced to go out of the screen advertising business because of inability to obtain outlets for their film advertising. The injurious effects of the agreements of each of the respondents have been materially increased by the cumulative effects of similar agreements with other exhibitors which have been entered into by each of the other respondents.
120 Although competitors of respondents are sometimes permitted to show their films on screens under exclusive contracts to one of the respondents, the cost of the film, overhead and sales expense so limits the profit of such competitor as to make this arrangement unprofitable, especially in local advertising.

The respondents have waived the filing of exceptions to the recommended decision of the trial examiner and have waived also the filing of briefs and the presentation of oral argument before the Commission. The trial examiner in effect has found that respondents' long-term exclusive screening arrangements constitute an unreasonable restraint and restriction of competition. He has further concluded that such exclusive screening arrangements as extend for one year or less do not unduly or unreasonably restrain trade. In this connection, the trial examiner has given

weight to the fact that contracts with advertisers normally run for a period of one year, although in some instances they are for a lesser term and he concludes that the reasonableness of the restraints imposed under respondents' exclusive screening arrangements are dependent upon the relationship between the term of such screening agreement with the theater and the terms of the contracts with the advertisers.

It is apparent that the nature of the business of these respondents renders it desirable that they have an outlet through which they can screen their advertising film in order that prospective advertisers can be assured that screening space is available for such film advertising as they may like to purchase.

121 The general practice of respondents' representative is to contact theaters in the first instance to determine if space is available for screen advertising and to make such arrangements as conditions warrant with respect to such space. It is only then in normal course that respondents proceed with their efforts to obtain the commitments of merchants with respect to certain of respondents' advertising films.

In the opinion of the Commission, the conclusions of the trial examiner that such exclusive screening contracts are unduly restrictive of competition and hence unlawful when they extend for periods in excess of one year are supported by the greater weight of the evidence. The Commission moreover is of the view that in the circumstances here, such exclusive agreements as are limited to one year or less do not appear to unreasonably restrain trade.

That the period specified in a restrictive agreement may be important in determining the lawfulness of some types of exclusive provisions is demonstrated by the decision of the Court in United States v. American Can Company, 87 Fed. Supp. 18 (November 19, 1949). Under consideration in that case were contracts requiring customers to purchase their total requirements of specified merchandise from a particular source for periods up to five years. Although the Court concluded that the longer term agreements there involved constituted instruments by which competition was suppressed and eliminated and monopoly promoted, in applying the remedy therefor it was further concluded that agreements extending for one year should be absolved of adverse competitive effects in the circumstances of that case. The Court in such connection stated:

122 "Mindful that requirements contracts are not per se unlawful, and that one of the elements which should be considered is the length thereof, it is only fair to conclude after a careful review of the evidence, that a contract for a period of one year would permit competitive influences to operate at the expiration of said period of time, and the vice which is now present

the five year requirements contracts, would be removed. Under contract limited to one year, the user-consumer would be guaranteed an assured supply and protected by a definite obligation the part of American to meet the totality of needs of the canr, while he, in turn, would have a fixed obligation to purchase s seasonal needs from American, thus making for mutuality of ntract and obligation.

"To strike down the requirements contracts and to declare them tally void as violative of the Sherman Act, without at the same ne affording to the user-consumer a supply over a limited period time, would be destructive, illogical, unsound and not in conmance with the acute and particular problems confronting the nning industry."

It is noted, however, that at the time this opinion is being written, the judgment of the trial Court in that case has not yet become nal since hearings pertaining to the type of relief to be granted e in progress.

As of August 1947, the total number of exclusive agreements ld by respondents in the aggregate approximated three-fourths the total number of theaters in the United States which reen film advertising for compensation. Although the Commission has determined in these cases that the effects of the 3 exclusive contracts for a period in excess of one year have been to unduly restrain competition, the action of the Commission in these cases manifestly does not impinge on the rights respondents to contract for extended terms on a nonexclusive sis with theater owners under circumstances which do not unly hinder competition. The corrective action of the Commison is directed only to such exclusive agreements as are designed exclude unreasonably for prolonged periods the advertising ms of competitors of respondents from the screens of theaters. is the view of the majority of the Commission that the orders cease and desist which are issuing herewith are appropriate the circumstances here.

Before Federal Trade Commission

ote re dissenting opinion of Commissioner Lowell B. Mason

Docket No. 5498

IN THE MATTER OF MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

Commissioner Mason dissents to the order herein for the reasons has set forth in Docket No. 5495, Ray-Bell Films, Inc.

Lowell B. Mason,
(LOWELL B. MASON),
Commissioner.

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

I, D. C. Daniel, Secretary of the Federal Trade Com-
124 mission, and official custodian of its records, do hereby certify that attached is a full, true, and complete copy of: dissenting opinion by Commissioner Lowell B. Mason in Docket 5495, in the matter of Reid H. Ray Film Industries, Inc., referred to in dissenting opinion by Commissioner Mason in Docket 5498, in the matter of Motion Picture Advertising Service Company, Inc., which latter record was certified to the United States Court of Appeals for the Fifth Circuit, April 5, 1951; that this document is certified to the United States Court of Appeals for the Fifth Circuit pursuant to the request of counsel for petitioner.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Federal Trade Commission to be affixed this 8th day of June A. D. 1951 at Washington, D. C.

[SEAL] D. C. DANIEL,
Secretary.

Before Federal Trade Commission

Dissenting opinion of Commissioner Lowell B. Mason

Docket No. 5495

IN THE MATTER OF RAY-BELL FILMS, INC.

To understand the subject of this litigation one must know what trailer ads are because we are here concerned with the leasing of screen time in theaters for the exhibition of respondent's trailer ads.

125 When you look at a picture extolling the virtues of a specific commercial product, you are looking at a trailer ad.

People mostly go to the movies to forget their cares. In the words of the industry, "This is the privilege of motion pictures, that they bring great joy and relaxation to humankind."

Trailer ads do not bring audiences much of either. Generally, people believe any form of advertising in a place of amusement is a bore and ought to be done away with.

On the other hand, the small theater owner benefits from trailer ads. He is paid to show them.

Features, news reels and shorts cost him money. However, trailer ads actually reverse the flow of film money back into his own till. He pays for a film of somebody's love life, but he gets paid for showing the cold facts about somebody's breakfast food or shaving mugs.

The order in this case prohibits the trailer ad maker from leasing screen time from a theater owner for a greater period than one year. If we could do this, it might be a great favor to audiences. Unforunately, the privilege of boring the public for pay is a theater owner's inalienable right, provided he doesn't carry the thing too far.

People know trailer ads help eke out an existence for the small exhibitor. It's sort of a subsidy to keep the marginal operator alive. This is why audiences in small towns and communities sit quietly every night whilst the community theater parades a variety of commercial plugs across the screen.

126

I do not believe we should prohibit a theater owner from leasing exclusive space in his lobby, his basement, his roof or even on his screen for as long as he wants provided the subject matter of the ad is legal. Yet that is in actual effect what the order here does. It restricts one class of persons (trailer ad distributors) from buying what another class (theater owners) may want to sell, namely a lease for more than one year.

It must be borne in mind that the gravamen of the charge is not aimed at the exclusiveness of the contract for as the Findings of Facts concede:

"Since film advertising space in theatres is limited to four, five or six advertisements, it is not unreasonable for respondent to contract for all space available for local advertising in such theatres, particularly in territories canvassed by its salesmen at regular and frequent intervals."

The prohibition runs to the length of the lease rather than its terms. The order says "yes" to one year but "no" to anything longer.

As I pointed out at the beginning, trailer ads are a source of income to small theaters. The large and powerful movie house disdains to use such films. As a consequence, any restriction on the right to lease screen time affects only small businessmen. For them, it may be that portion of income which represents the difference between profit and loss. I think the question as to whether a long or short lease is the better should be left to the judgment of the small businessman. At least I would like him to have the privilege of choice. Nowhere in our 43 volumes of decisions can I find where we have held a one-year lease was legal but that the same lease for a longer period was an unfair act or practice in commerce.

127

Leaving for the moment the unsalutory but indirect effect of this order on small exhibitors let us consider the direct problem of respondent in this case.

I believe we should approach this not as a legal abstraction but realistically.

When a man sells something he does not have on his shelf he is a speculator. When the respondent (as here) is prohibited from assuring himself screen space for more than one year the time lag between the act of purchasing that space for one year and reselling it to advertisers for one year will always place him in the speculator's seat.

We are reassured the order won't hurt the respondent because, in the words of the Trial Examiner:

"The theatre completes the screening of advertisements as required by contract between respondent and the advertiser even though the expiration date of the contract extends beyond the expiration date of the screening agreement between the respondent and theatre."

I like to think of all businessmen as generous but an order against a respondent which relies on the implied generosity of others to go easy on the hapless defendant stretches governmental optimism too far.

128 Perhaps the case is of scant moment. Certainly a decision one way or another will not greatly affect our economy, but I dissent rather than let the matter go by because it illustrates the inequality and error that creep in to the Procrustean fitting of the law enunciated in such ponderous cases as U. S. vs. American Can (relied upon by the majority) when seeking to regulate the many and infinitesimal problems as are illustrated by Ray-Bell's alleged monopolistic practices here.

On the one hand we have litigation against a can company doing a fifth of a billion dollars' worth of business a year (the biggest in the world), and controlling over 46 percent of the "competition" (if such it be) in the sale of cans.

On the other hand we have a tiny enterprise whose share of the limited market for film trailer ads is represented by the figure of 458 leases out of a probable 12,676 and a possible 20,306 or less than four per cent of the competition.[2]

129 To apply the reasoning of the Court in the American Can case here is like killing butterflies with a pile driver.

Nor can I put much stock in the plea that this order is needed to nip monopoly in the bud. If we nipped every bud with four per cent of a market the fields of American industry would look like Egypt's after the locusts. Ray-Bell has a long way to grow before its competitors need fear it will grow into a monopoly.

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[2] The majority opinion written to apply to the four companies sued states:

"The total number of exclusive agreements held by respondents in the aggregate approximated 75% of total number."

To carry this reasoning a step further, if the F. T. C. had sued all the film ad companies we could justify antimonopoly orders against a tyro with two dollars worth of annual business on the grounds that he with all the others approximated 100% of the total industry.

When the Federal Trade Commission gets into determining how long an ad taker's lease shall run, we open up an astonishing new field of activity for us and one that we might well wish ourselves out of before we hear the end of it.

I am against it.

Lowell B. Mason,
(LOWELL B. MASON),
Commissioner.

130 Before Federal Trade Commission

Motion to modify cease and desist order

Received December 29, 1950

[Title omitted.]

Now comes Motion Picture Advertising Service Company, Inc., a Corporation, respondent in the above entitled proceeding, and moves the Commission to modify its Cease and Desist Order issued on October 17, 1950, and received by respondent in New Orleans, Louisiana on November 2, 1950, by deleting therefrom immediately following the word "year" in the fourth line of the indented portion of said Order, the following words, to wit:

"* * * or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order."

so that said Cease and Desist Order, when so modified, shall read as follows, to wit:

"It Is Ordered that the respondent, Motion Picture Advertising Service Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale, leasing or distribution of commercial or advertising films in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from—.

131

"Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theatres owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year."

In support of the foregoing motion respondent states:

1. Respondent has outstanding exclusive theatre screening agreements with motion picture exhibitors, the unexpired terms of which extend more than one year beyond the effective date of the Cease and Desist Order issued by this Commission, and if respond-

ent is required to cancel these contracts or refuse to perform thereunder from and after one year from the effective date of said Cease and Desist Order an undue burden and unnecessary hardship will be placed upon respondent without any public interest being served, for the following reasons, to wit:

(a) In many instances respondent has, at the time of the signing of the contracts, paid to the motion picture exhibitors a lump sum representing the purchase price or fair rental value of screen space for the entire terms of the contracts. Therefore, the cancellation of these contracts, or of that portion of the
132 term thereof which extends beyond one year from the effective date of the Cease and Desist Order, would result in a serious financial loss to respondent.

(b) In many instances the exclusive provisions contained in said contracts and the length of the terms thereof constitute contractual requirements made by the motion picture exhibitors and not by respondent as a condition to the entering into of said contracts. Therefore, the cancellation of such contracts, or that portion of the term thereof which extends beyond one year from the effective date of said Cease and Desist Order, would place respondent in the position of refusing to carry out its obligations with the motion picture exhibitors who were not made parties to this proceeding. The very existence of respondent's business depends upon maintaining the good will of the motion picture exhibitors; and the cancellation of theatre screening agreements will, in many instances, adversely affect this good will.

2. Respondent has been from time to time, and is now, in active and substantial competition with all other film distributors in the sale and distribution of commercial or advertising films, and particularly in the securing of screening agreements with motion picture exhibitors. In addition, the uncontradicted evidence is that an average of one-third of the theatre screening agreements between respondent and motion picture exhibitors terminate each year. Therefore, respondent's theatre screening agreements, the terms of which extend beyond one year from the effective date of the Cease and Desist Order, do not and cannot constitute such an unreasonable restraint of trade as would require the cancellation of such screening agreements.

133 3. That the recommended decision of the Trial Examiner filed herein on May 31, 1949, contains his recommendation that the respondent be required to cease and desist from:

"Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theatres owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year."

4. That this respondent and its attorneys relied upon the assumption that if no exceptions were filed by either party to the Trial Examiner's report then the report would be adopted by the Commission and the recommended decision and order would be entered.

5. That relying upon said assumption, counsel for this respondent and counsel in support of the complaint entered into a stipulation on June 15, 1949, under the terms of which both parties waived the filing of exceptions to the Trial Examiner's report and other intervening procedure, including the filing of briefs and the presentation of all arguments before the Commission.

6. That this respondent was willing to enter into such stipulation because it could comply with the recommended Cease and Desist Order without great financial loss or burden, but it cannot comply with the additional provisions of the Cease and Desist Order as entered by this Commission under date of
134 October 17, 1950, without substantial financial loss, detriment and burden.

7. That the issuance of any retroactive order by the Commission was not raised in the pleadings or made an issue in the proceedings, and no evidence of the effect of such Order on this respondent is contained in the record.

Wherefore, Motion Picture Advertising Service Company, Inc., respondent herein, respectfully prays that the Cease and Desist Order heretofore rendered herein by the Commission be reconsidered, and that after such reconsideration said Order be modified and amended as hereinabove set forth.

Respondent further prays that the Commission fix a time for oral argument of this motion after reasonable notice to respondent's attorneys.

ROSEN, KAMMER, WOLFF,
HOPKINS & BURKE,
LOUIS L. ROSEN.
Attorneys for Motion Picture Advertising Service Company, Inc., a corporation, Respondent.

1801 Hibernia Bank Building, New Orleans, Louisiana

135 Before Federal Trade Commission

Answer to motion to modify order to cease and desist

Received January 15, 1951

[Title omitted.]

STATEMENT OF CASE

A complaint was issued on May 26, 1947, in which the respondent was charged with a violation of Section 5 of the Federal Trade Commission Act. The specific charge was that the respondent was engaged in the practice of entering into and carrying out contracts with theater owners for the exclusive use of the entire time allotted such theater owners for screen advertising. Several hearings were held for the purpose of taking testimony.

On May 31, 1949, the Trial Examiner filed his recommended findings as to the facts and order. On June 15, 1949, counsel supporting the complaint and counsel for respondent entered into a stipulation in which both parties waived the filing of exceptions, briefs and oral argument. On October 15, 1950, the Commission issued an order to cease and desist and said order was served on respondent on November 2, 1950.

136 The order issued by the Commission differs from the order recommended by the Trial Examiner in the respect pointed out in the brief in support of respondent's motion. The matter is now before the Commission on respondent's motion to modify the order.

ARGUMENT

Counsel supporting the motion to modify the order contends that to comply with that part of the order which reads "or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order" would work a great hardship on respondent and cause respondent to lose a considerable amount of money which it has paid to theater owners for the screening time called for in the contracts, and in addition, would also cause respondent to lose the good will of the theater owners. Counsel also contends that the quoted language (This language is in addition to the order recommended by the Trial Examiner.) was not taken into consideration by the respondent at the time counsel entered into the stipulation in which counsel waived exceptions to the Trial Exam-

iner's recommended findings as to the facts and order, for counsel assumed that the Commission would issue the order in the language recommended by the Trial Examiner.

We would like to state here that at the conference where the stipulation was worked out, there were no promises made by counsel supporting the complaint that such an order would be
137 issued; but counsel supporting the complaint did state that it was his opinion that the Commission would, in all probability, follow the Trial Examiner's recommendation. We presume that all parties acted on that assumption. Counsel, in his brief in support of the motion to modify the order, does not state that counsel supporting the complaint represented that the Commission was in any way bound by the Trial Examiner's recommended decision and we do not believe that counsel intended to convey such an idea in his brief. Counsel supporting the complaint was thoroughly convinced that all parties understood that the Commision had the right to issue any order it desired to enter provided such an order was supported by the record.

It appears appropriate to point out here that the Trial Examiner recommended and the Commission found that the contracts entered into by respondent, where the terms of such contracts extended for more than one year, were unfair methods of competition within the intent and meaning of the Federal Trade Commission Act, and, therefore, illegal. Counsel does not contend that the Commission's finding on that point was wrong. So, in considering this matter, it is necessary to keep in mind the fact that the contracts affected by that part of the order challenged by respondent are illegal contracts and they were not made illegal by the Commission's order, but by statute. They were illegal even before the commission issued its complaint.

Counsel does not state in his brief the number of contracts, the terms of which extend for more than a year beyond the effective date of the order; but counsel does state:

138 "The uncontradicted evidence is that an average of one-third of the theater screening agreements between respondent and motion picture exhibitors terminate each year. Therefore, respondent's theater screening agreements, the terms of which extend beyond one year from the effective date of the cease and desist order, do not and cannot constitute such an unreasonable restraint of trade as would require the cancellation of such screening agreements."

In answer to that contention, it can be said that the complaint was issued on May 26, 1947. At that time the respondent had notice that the Commission considered such contracts illegal. The order was issued October 17, 1950, and served on respondent

on November 2, 1950. So, for a period of approximately three and one-half years respondent had notice that the Commission considered the contracts illegal. By the terms of the order the contracts in force could remain in force for another twelve months after the date of the order. That would be one year more or a total of four and one-half years that the respondent had notice that the Commission considered such contracts illegal. If one-third of the contracts expire each year, as stated by counsel, then it stands to reason that all of the contracts should have expired or would expire before any complaint could be made about respondent's failure to cancel them. If counsel should contend that it was unfair to calculate the time from the date the complaint was served, he surely could not complain of calculating the time from the date he entered into the stipulation not to take exceptions to the Trial Examiner's recommended decision. The stipulation was entered into on June 15, 1949, and the Commission's order was issued on October 15, 1950, and served on
139 respondent on November 2, 1950, a period of approximately eighteen months and the respondent was given another twelve months within which to cancel out the contracts.

It appears to us that it is a complete answer to all of the argument advanced by counsel to say that the contracts were illegal and that the respondent had no right to enter into such contracts in the first instance.

It appears to us that the order is more favorable to respondent than the law requires. We are of the opinion that the contracts (exclusive), whether for one year, two years, or even for one month are "unfair methods" of competition and therefore illegal. Counsel, in his brief, does not contend that the contracts, the terms of which are for more than one year, are not illegal. His contention is that respondent should be permitted to perform or carry out the terms of an illegal contract if non-performance would be injurious or burdensome to respondent.

We respectfully submit that on the merits, the motion to modify should be denied.

Respectfully submitted.

Floyd O. Collins,
(FLOYD O. COLLINS),
Counsel Supporting the complaint.

JANUARY 15, 1951.

JOSEPH E. SHEEHY,
Director, Bureau of Antimonopoly.

EVERETTE MACINTYRE,
Assistant Director, Bureau of Antimonopoly.

140 Before Federal Trade Commission

Order denying respondent's motion to modify order to cease and desist

March 6, 1951

Commissioners: James M. Mead, Chairman, William A. Ayers, Lowell B. Mason, John Carson, Stephen J. Spingarn.

[Title omitted.]

This matter is before the Commission for its consideration of the respondent's motion, filed December 29, 1950, seeking modification of the order to cease and desist issued in this proceeding on October 17, 1950, and requesting the Commission to fix a time for oral argument on this motion, and the answer to such motion, filed by counsel in support of the complaint.

The order to cease and desist, the modification of which is sought, reads in part as follows:

"It Is Ordered that the respondent, Motion Picture Advertising Service Company, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any cor-
141 porate or other device, in connection with the sale, leasing or distribution of commercial or advertising films in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from—

Entering into contracts with motion picture exhibitors for the exclusive privilege of exhibiting commercial or advertising films in theaters owned, controlled or operated by such exhibitors when the term of such contracts extends for a period in excess of one year, *or continuing in operation or effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends for a period of more than a year from the date of the service of this order.*" [Italics supplied.]

Respondent moves the Commission to modify its order by deleting therefrom that part which is above underlined.

Respondent in its motion states that it has exclusive theater screening agreements with motion picture exhibitors, the unexpired terms of which extend more than one year beyond the effective date of the order. It contends that if required to cancel these contracts or refuse to perform thereunder from and after one year from the effective date of said order it will suffer serious financial loss in that it has paid for screen space in advance for the entire term of a number of such contracts and will suffer loss

required the exclusive dealing provision as a condition for entering into the said contracts.

142. The Commission in its decision in this matter, issued on October 17, 1950, concluded that in the circumstances the use by respondent of its exclusive screening agreements which extend for terms greater than one year constitutes an unreasonable restraint upon competition and is in violation of the Federal Trade Commission Act. Respondent by this motion does not question the illegality of the exclusive screening agreements which extend for a term of over one year, but restricts itself to requesting the Commission to permit it to complete the unexpired terms of contracts containing such exclusive screening provisions.

Respondent, by its motion requesting the Commission to modify its order so as to permit respondent to continue the use of such exclusive screening provisions in its existing contracts is attempting to continue to secure the benefits of its illegal acts.

Not only has the use by respondent of such exclusive screening provisions in its contracts been illegal from their inception, but respondent has been given ample notice of this fact by the Commission. The provision of the order objected to by the respondent applied only to exclusive screening provisions which under the terms of the contracts extend beyond November 2, 1951, one year after the date of service of the said order. This date is over four years and five months from the date, May 26, 1947, on which the Commission by the issuance of its complaint herein notified respondent it had reason to believe its use of an exclusive screening provision in its contracts was illegal and is over two years and five months from the date, May 31, 1949, on which the trial

143 examiner, after considering the matter, recommended that the Commission rule that the use of such exclusive screening provisions is illegal.

As stated in the Commission's findings as to the facts in this matter, respondent has entered into such exclusive agreements with exhibitors for a maximum period of five years, with the majority being written for one or two year terms. Therefore, while a few of respondent's contracts affected by the order may have been entered into prior to the issuance of the complaint, the majority of such contracts were entered into not only after the issuance of the complaint, but were entered into after the trial examiner recommended that the use of these agreements be found to be illegal.

The Commission is of the opinion that this respondent should not be permitted to continue to secure the benefit of its illegal use of such exclusive screening provisions in its existing contracts.

stances oral argument on this motion would serve no useful purpose.

It Is Therefore Ordered that the respondent's motion to modify the order to cease and desist herein and its request for oral argument thereon be, and they hereby are, both denied.

By the Commission, Commissioner Mason dissenting, Commissioner Spingarn not participating. Mr. Mason dissented in
144 accordance with the views expressed in his dissenting opinion accompanying the findings and order in this case.

[SEAL]

D. C. Daniel,
(D. C. Daniel),
Secretary.

Issued: March 6, 1951.

CERTIFICATE OF SECRETARY

(Omitted in printing)

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 28, 1952.

No. 13493

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

versus

FEDERAL TRADE COMMISSION

On this day this cause was called, and after argument by Louis J. Rosen, Esq., for petitioner, and J. B. Truly, Esq., Attorney Federal Trade Commission, for respondent, was submitted to the Court.

OPINION OF THE COURT FILED

Filed February 21, 1952

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13493

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC., *Petitioner*,

versus

FEDERAL TRADE COMMISSION, *Respondent*.

Petition to Review Order of the Federal Trade Commission, sitting at Washington, D. C.

(February 21, 1952.)

Before HOLMES, BORAH, and STRUM, Circuit Judges.

HOLMES, Circuit Judge: This is a proceeding under Section 5 of the Federal Trade Commission Act, 15 U. S. C. 41, wherein the petitioner is charged with engaging in unfair methods of competition in commerce by entering into long-time exclusive screening agreements. The defense is, first, a plea of *res judicata* and, second, a

denial that the alleged exclusive agreements have a tendency or effect unduly to lessen, restrain, suppress, or injure, competition in the distribution or exhibition of advertising films in motion picture theatres. The plea of *res judicata* was overruled by the Commission, and the case tried upon its merits.

There is no charge in the complaint of any combination or conspiracy; the sole charge is that the petitioner, individually, has been guilty of an unfair method of competition within the intent and meaning of the act. The Commission found the petitioner guilty as charged, and ordered it to cease and desist in the future from entering into theatre screening agreements for a term in excess of one year; and also to discontinue in operation or effect any exclusive theatre screening provisions in existng contracts when the unexpired term thereof extended for a period of more than one year from the date of the service of the cease and desist order. Three separate and similar complaints were issued at the same time against three other corporations engaged in the same business. The cases were tried together under a stipulation that need not be fully stated here, but that was intended to avoid the necessity of having certain witnesses repeat their testimony.

Passing the question of *res judicata,* we proceed to a consideration and determination of the case on its merits. In the conduct of its business, the respondent enters into written screening agreements with exhibitors for a maximum period of five years, the majority being written for terms of one year or two years. About 25 per cent of petitioner's screening agreements are for a period of five years. These agreements provide that the exhibitor shall properly display advertising films supplied by petitioner, return such films at the end of the screening period, and that the petitioner will pay the exhibitor each month for screening as designated in the contract. A substantial number of the contracts provide that the exhibitor will display only advertising films furnished by petitioner, except slides for charitable or governmental organizations or announcements of the theatre's coming attractions. The available space for screening advertisements is limited, as only about 60 per cent of the theatres accept film advertising; in addition, theatre patrons resent the showing of too much of this character of advertising, and thus impose economic barriers on the amount that may be run. The time consumed that will be tolerated by the public is said to be from three to six minutes, or from two to four per cent of the time consumed by the show.

The Commission concluded that an exclusive screening agreement for a period of one year was not an undue restraint on competition, but that such agreement for a longer period should be prohibited. The record shows that there is free and open competi-

ion among the distributors to secure such agreements, and that, rom the beginning of the industry, distributors have sought and btained exclusive screening agreements. The Commission having letermined that exclusive agreements are not unfair or illegal *per se* but are necessary for the operation of the business, we are onfronted with preponderating testimony that no prudent person vould invest sufficient capital in the business without assurance f exclusive screening space for a longer period than one year; and hat theatres themselves frequently demand guaranties for a longer eriod, or otherwise refuse to exhibit motion picture advertise- nents. As pointed out by the dissenting member of the Commis- ion, the prohibition runs to the length of the lease rather than to ts terms. We quote further from the dissent as follows:

"To understand the subject of this litigation one must know what trailer ads are because we are here concerned with the leasing of screen time in theatres for the exhibition of respondent's trailer ads. . . . Generally, people believe any form of advertising in a place of amusement is a bore and ought to be done away with. The small theatre owner benefits from trailer ads. He is paid to show them. Features, news reels, and shorts, cost him money. However, trailer ads actually reverse the flow of film money back into his own till.

"The order in this case prohibits the trailer ad maker from leasing screen time from a theatre owner for a greater period than one year. If we could do this, it might be a great favor to audiences. Unfortunately, the privilege of boring the public for pay is a theatre owner's inalienable right, provided he doesn't carry the thing too far.

"People know trailer ads help eke out an existence for the small exhibitor. It's sort of a subsidy to keep the marginal operator alive. This is why audiences in small towns and communities sit quietly every night whilst the community theatre parades a variety of commercial plugs across the screen.

"I do not believe we should prohibit a theatre owner from leasing exclusive space in his lobby, his basement, his roof or even on his screen for as long as he wants, provided the subject matter of the ad is legal. Yet that is in actual effect what the order here does. It restricts one class of persons (trailer ad distributors) from buying what another class (theatre owners) may want to sell, namely a lease for more than one year. . . . As I pointed out at the beginning, trailer ads are a source of income to small theatres. The large and powerful movie house disdains to use such films. As a consequence, any restriction on the right to lease screen time affects only small businessmen. For them, it may be that portion of income

which represents the difference between profit and loss. I think the question as to whether a long or short lease is the better should be left to the judgment of the small businessman. At least I would like him to have the privilege of choice. Nowhere in our 43 volumes of decisions can I find where we have held a one-year lease was legal but that the same lease for a longer period was an unfair act or practice in commerce. . . .

"When the Federal Trade Commission gets into determining how long an ad taker's lease shall run, we open up an astonishing new field of activity for us and one that we might well wish ourselves out of before we hear the end of it.

"On the one hand we have litigation against a can company doing a fifth of a billion dollars worth of business a year (the biggest in the world), and controlling over 46 per cent of the 'competition' (if such it be) in the sale of cans. [*United States* v. *American Can Co.*, 87 Fed. Supp. 18.] The majority opinion written to apply to the four companies sued states: 'The total number of exclusive agreements held by respondents in the aggregate approximated 75% of the total number.' To carry this reasoning a step further, if the F. T. C. had sued all the film ad companies we could justify anti-monopoly orders against a tyro with two dollars worth of annual business on the grounds that he with all others approximated 100% of the total industry."

It is self-evident, we think, that the theatre owner is entitled to choose his own distributor, and to sell, assign, lease, or give, his space for any purpose that he sees fit, subject to the police power of the state or federal government. In the instant case, because a large number of these films are transported in interstate commerce, the constitutional power of the United States to regulate commerce, and the statutes enacted in pursuance thereof, govern our decision. The ultimate determination of what constitutes unfair competition is for the court, not for the Commission; and the same rule must apply when the charge is that leases, sales, agreements, or understandings, substantially lessen competition or tend to create a monopoly. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568-580.

The court must inquire whether the Commission's findings of fact are supported by substantial evidence; if so, they are conclusive; but as the statute grants jurisdiction to this court to affirm, modify, or set aside, any order of the Commission, it is our duty to examine the whole record; and, if from all the facts as found by the Commission, it clearly appears that no additional fact-findings are necessary and that, in the interest of justice, the

controversy should be decided without further delay, the court has full power under the statute to decide the case and to affirm, modify, or set aside the order under review. 15 U. S. C. A. 45(c). Cf. *Universal Camera Corp* v. *N. L. R. B.*, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. ——.

The petitioner's solicitation and obtaining of exclusive theatre screening agreements are methods of competition in commerce, but the proof has failed to establish that they are unfair or that their prohibition would be in the public interest. Thus there are absent two distinct prerequisites to the power of the Commission to issue its order in this case to cease and desist. Cf. *Federal Trade Commission* v. *Raladam Company*, 283 U. S. 643, 646, 648.

In another aspect, we have here a contract of agency, and our decision is governed by *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568. In a strict legal sense, the theatre owners and operators have not sold or leased the petitioner any screening space, nor granted it any easement thereto; they are not the lessors or vendors of anything; it is the distributor who furnishes the films by bailment to the exhibitor. It is different from an easement for an advertisement on a lot or building where the sign is erected by the advertiser, and the owner merely grants the right to put it there. Here the distributor has no right to enter the theatre and operate the machine or display the advertisements; he has a contract for personal services, which the exhibitor is obligated to perform. The exhibitor agrees properly to display the advertisements at the rates and as provided in the screening agreement; and, with the exceptions stated, not to display any advertising films other than those furnished by the distributor. In other words, the exhibitor agrees to perform a specified service, for a stated period, at an agreed rate of compensation, and not to undertake the same service for any other distributor during the same period.

If it appears at any time in the course of a proceeding such as this that it is not in the public interest, the Commission should dismiss the complaint. If the Commission fails to do it, "the court should, without inquiry into the merits, dismiss the suit." *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 30, 68 A. L. R. 838, 846. We have not exercised this power but have decided the case on its merits, though it does not appear to be in the public interest to increase the number or amount of advertisements of this character. The Federal Trade Commission Act was not passed to protect private rights, and it did not enlarge or change the definition of unfair methods of competition as laid down by the courts prior to its enactment. *Federal Trade Commission* v. *Klesner*, *supra*.

Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic

tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence: then no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

Therefore, with available space and time for advertisements on the screen of motion-picture exhibitors severely limited, and with the business of distributors, by its nature, making it necessary that they have an assured outlet for a reasonable time for the screening of their prospective advertisements, we conclude that petitioner's method of soliciting and obtaining exclusive contracts with exhibitors for longer periods than one year was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management. Consequently, the cease and desist order of the Commission is set aside and the complaint dismissed. *Goldberg* v. *Tri-State Theatre Corp.*, 126 F. (2) 26; *United States* v. *Western Union Telegraph Co.*, 53 Fed. Supp. 377; *State For Use of Independence County* v. *Tad Screen Advertising Co.*, 133 S. W. (2) 1.

It is so ORDERED.

JUDGMENT

Extract from the Minutes of February 21, 1952.

No. 13493

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

v.

FEDERAL TRADE COMMISSION.

This cause came on to be heard on the petition of Motion Picture Advertising Service Company, Inc., to review an order of the Federal Trade Commission, issued October 17, 1950, "In the matter of Motion Picture Advertising Service Company, Inc., No. 5498," and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the cease and desist order of the said Federal Trade Commission in this cause be, and the same is hereby set aside and the complaint dismissed.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

I, OAKLEY F. DODD, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 146 to 156 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals, for the Fifth Circuit, in a certain cause in said Court, numbered 13493, wherein MOTION PICTURE ADVERTISING SERVICE COMPANY, INC., is Petitioner, and FEDERAL TRADE COMMISSION, is Respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 145 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 6th day of May, A.D. 1952.

OAKLEY F. DODD, Clerk

By /s/ J. A. FEEHAN, JR.,
J. A. FEEHAN, JR., *Chief Deputy Clerk, U. S. Court of Appeals, Fifth Circuit.*

(SEAL)

Supreme Court of the United States

No. 75, October Term, 1952

FEDERAL TRADE COMMISSION, PETITIONER

v.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

Order allowing certiorari

Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.